BUREAUCRACY IN NEW ZEALAND

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NEW ZEALAND INSTITUTE OF PUBLIC ADMINISTRATION

OXFORD UNIVERSITY PRESS

OVER FIFTY YEARS AGO Pember Reeves and Siegfried remarked on the importance of State functions in New Zealand. This book deals with the problems of *administering* the greatly-expanded State activities of today.

Frustrated members of the Public sometimes accuse public servants of 'bureaucracy'. Some of the more extreme charges against public servants, that they are power hungry or are empire-builders, are examined, and rejected, in this book.

Nevertheless, the problem remains that many administrators, by the nature of their jobs, are required to exercise discretion, for instance in granting or refusing various kinds of licences. How can members of the Public, who sometimes feel helpless in the face of an administrative decision, be sure that this discretion is wisely used and adequately controlled? What are the possibilities of legal appeal? Should a new supreme administrative tribunal be created? How effective are appeals to Ministers? The 1957 Convention of the New Zealand Institute of Public Administration was devoted to these questions. Its papers and discussions are reproduced in this book.

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Bureaucracy in New Zealand

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edited by R. S. Milne. 1957

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EDITED BY R. S. MILNE

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1957

WELLINGTON · NEW ZEALAND INSTITUTE OF PUBLIC ADMINISTRATION

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LONDON · OXFORD UNIVERSITY PRESS

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PRINTED BY WHITCOMBE AND TOMBS LIMITED

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Contents

Introduction

R. S. MILNE

Professor K. C. Wheare has justly described Britain as a 'parliamentary bureaucracy'. The papers delivered at the 1957 Convention of the New Zealand Institute of Public Administration and now printed in this book, suggest that the same description could be applied to New Zealand. Bureaucracy, in its technical, not its popular, sense is a necessary part of our system of Government. However, the specific theme of the Convention was not bureaucracy, as such, but an important aspect of it – the exercise of administrative discretion. Nowadays, Government is so wide and complex in its scope that senior public servants have considerable discretion in interpreting and applying laws and regulations. As Matthew Arnold observed, with some exaggeration, nearly a century ago, 'He who administers, governs, because he infixes his own mark and stamps his own character on all public affairs as they pass through his hands. . .' This book is therefore concerned with administrative discretion; why it exists, how it is used, how it might be abused and how it may be controlled. Bureaucracy and discretion exist, not only in the operations of central government, but also in private business, local government and elsewhere. Nevertheless, this book is concerned only with the working of central government.

At this point it may be worth while recalling certain features of the New Zealand scene which provide the setting for the activities of public servants. The population of New Zealand is still small (about two millions and a quarter), and local manufacturing has only recently become important. Outside the cities and large towns

local government has limited functions, and is badly in need of reorganization.[1] But the central government, particularly since the abolition of the provinces in 1876, has always played an important rôle. Because of the absence of large private firms and the weakness of local government, the State organization stands out like a colossus.

The New Zealand tradition of equality is clearly at the root of other characteristics of Government. It accounts for the absence of any separately selected administrative class. Recruitment to such a class by special examinations, as in Britain, would be 'undemocratic', that is, it would offend New Zealand notions of equality. The tradition also explains why Ministers are easily accessible for interview; they are also expected to take a more urgent personal interest in individual events than they would be in a larger country.

The book consists of six contributions. The themes are not entirely separate, because it was intended that the same problem should be looked at from several different angles. The opening paper attempts to show that the existence of administrative discretion, the fact that some officials are in a position to exercise power, is an important feature of bureaucracy. It maintains that administrative discretion is inevitable, and examines in a general way how it should be used and how it can be controlled.

Mr F. Baker's contribution, 'Public Servants as Ministerial Advisers', begins with a valuable case-study of the working of the Rehabilitation Department, of which Mr Baker was formerly Permanent Head. This account is particularly useful, because it is not just another description of the *conventional* Minister-Permanent Head relation. Both Minister and Permanent Head were members of the Rehabilitation Board, and Mr Baker shows how this influenced their dealings with one another. The second part of his paper consists of general observations on a Permanent Head's rôle particularly in the various types of government organizations where boards have been created.

The next paper, by the Hon J. R. Marshall, is written from the Minister's viewpoint. Out of his own experience he gives an account of the sources of policy; the recommendations of public servants are only one of many such sources. He also describes the methods by which a Minister can control the administration without

[1] See R. J. Polaschek (Ed.), *Local Government in New Zealand* (New New Zealand Institute of Public Administration, 1956).

himself becoming involved in too much detail. In the discussion which followed, summarized at the end of his contribution, Mr Marshall made some interesting comments on the view expressed from the floor that the accessibility of Ministers might distract them from thinking sufficiently about future policy.

Mr D. J. Riddiford's theme is 'A Citizen's Point of View'. The author does not agree with some of the charges that have been made against the Public Service. He does not think that, generally, the Public Service is unduly conservative, or that promotion is too much by seniority. However, he believes that the checks on administration, particularly through Parliament, should be strengthened. Also, because of the long forty-five year interval since the Hunt Commission Report, there should be another Commission on the Public Service.[2] Mr Riddiford's chief proposal is that there should be a new administrative division, a quarter of it to be recruited by examination from highly qualified University graduates.

The last two papers deal with the *control* of administrative discretion. Mr R. B. Cooke examines the *legal* controls which exist to preserve the rights of citizens. He traces changes in the attitude of the courts in performing their constitutional function of ascertaining the legal limits of discretionary administrative authority. In his opinion, the courts throughout their history have been in general reasonably flexible in meeting the challenge of new social conditions; this being so, Mr Cooke does not at present accept the case put forward for a supreme administrative tribunal which, as well as hearing appeals from other administrative tribunals and authorities, would take over the existing responsibilities of the ordinary courts in the field of administrative law.

Mr P. B. Marshall's paper on 'The Professional Ethics of Administrative Discretion', is concerned with *internal* controls on administrators; he examines the standards of behaviour which exist in the Public Service, and finds that they are high. By considering examples of how rules are arrived at and decisions made in the field of licensing, he illustrates the administrator's search for the public interest. Mr Marshall also comments penetratingly on the ethics of advising Ministers and on the wise use of public relations.

The papers and discussions reproduced in this book have perhaps cleared away a good deal of dead wood. In the light of the evidence which follows, a fair-minded reader will surely find that

[2] During the Convention the New Zealand Institute of Public Administration announced that it favoured a similar proposal.

some of the more extreme charges against the Public Service are hard to substantiate; that it is inordinately large, that most senior public servants are power-hungry or that Ministers are puppets in the hands of administrators.

It is now plain that the main problems lie in other directions. What can be done about the feeling of helplessness that affects some members of the Public in the face of administrative decisions? At the beginning of new government programmes, when fresh standards are being set, how can the Public be told what is happening? Where possibilities of legal appeal are limited, as in the field of economic regulation apart from price control, how can the internal checks be strengthened and their existence made clear to the Public? If appeals to Ministers increase, can the tradition of ministerial accessibility still be maintained? How can proposals, such as Mr Riddiford's, for a new administrative division of the Public Service, be given fair consideration in the face of the parrot cry that they are 'undemocratic'?

The 1957 Convention should not be reproached for having failed to solve such problems; its great merit is to have revealed them as of outstanding importance.

The Institute is grateful to those who read papers at the Convention and to all who took part in the discussions. It is particularly indebted to the Hon J. R. Marshall, who, in addition to contributing, opened the Convention with a short address.

The editor also wishes to acknowledge the generous help he has received from his fellow-bureaucrats, whether public, private or academic.

The Inevitability of Administrative Discretion

R. S. MILNE

> 'Our laws are not generally known; they are kept secret by the small group of nobles who rule us. We are convinced that . . . (they) are scrupulously administered; nevertheless it is an extremely painful thing to be ruled by laws that one does not know.'
>
> FRANZ KAFKA

BUREAUCRACY, POWER AND DISCRETION

'Bureaucracy' is a popular word for an unpopular thing. One particular aspect of bureaucracy has been selected as the theme of this book, the discretionary powers exercised by public servants. In spite of the variety of meanings given to the word, I wish to show, at the outset, that many of them do in fact turn on this chosen topic of discretionary power.

To be sure, this is not immediately obvious if we consider what is perhaps the most authoritative analysis of bureaucracy – Max Weber's.[1] However, his approach is worth considering, because his description of the institution of bureaucracy is dispassionate and has wide application. It is not limited to Government, but

[1] H. H. Gerth & C. W. Mills, *From Max Weber: Essays in Sociology* (Routledge, 1948), pp. 196 ff. See also C. J. Friedrich & Taylor Cole, *Responsible Bureaucracy,* (Harvard, 1932), p. 18. For a general discussion, see the *Working Papers and Discussion Reports* of the International Political Science Association Conference on Comparative Public Administration with special reference to Bureaucracy, published by the Association, 1953.

applies also to large private organizations. Weber does not really *define* the word, but attempts to list the characteristics of what he calls an 'ideal type' of bureaucracy. They include the existence of fixed official areas of jurisdiction, a hierarchy in which lower offices are subordinate to higher ones, management according to general rules and by means of written documents ('the files') and the employment of trained officials.

Weber then says that these characteristics have certain consequences; the officials owe their loyalty not to a person but to an institution; they normally have security of tenure and so on.

Some other definitions are little different from Weber's. Marshall Dimock, for instance, attempts to sum up the heart of Weber's view by describing bureaucracy as an institutional result of complexity and size.[2] However, perhaps great size is not quite so important;[3] New Zealand government departments, most of which are comparatively small, seem to be quite large enough to come within Weber's definition.

Although Weber is evidently interested in bureaucracy mainly from the institutional point of view, he does mention the power aspect: 'under normal conditions the power position of a fully developed bureaucracy is always overtowering'. He does not develop the point at length, nor does he explain what he means by 'normal' and 'fully developed'. His approach really is a foundation for, and a complement of, definitions of bureaucracy in terms of power.

This second type of approach, on the analogy of terms such as democracy and oligarchy, is in accord with the literal translation of the word, rule by officials. Thus Laski writes, 'Bureaucracy is the term usually applied to a system of government the control of which is so completely in the hands of officials that their power jeopardizes the liberties of ordinary citizens'.[4] More briefly, Ramsay Muir defines bureaucracy as 'the exercise of power by professional administrators, by trained and salaried officials'.[5] Both Laski and Muir regard bureaucracy as evil, but the definitions are not very

[2] M. E. Dimock, 'Bureaucracy self-examined', *Public Administration Review*, Vol. IV, no. 3 (1944), pp. 197ff.

[3] See W. A. Robson (Ed.), *Bureaucracy and Democracy* (Hogarth, 1956), pp. 4-5.

[4] *Encyclopaedia of the Social Sciences*, Vol. 3 (Macmillan, 1930).

[5] *Peers and Bureaucrats* (Constable, 1910), p. 8. See also R. Bendix, 'Bureaucracy and the Problem of Power', *Public Administration Review*, Vol. V, no. 3 (1945), pp. 194-209.

precise; just *how much* power would an official need to have in order to count as a bureaucrat? The relation between Ministers and Permanent Heads is described at some length in later contributions. Perhaps at this point it is necessary to say just that high ranking officials *must* in fact exercise substantial powers (quite apart from any that may have been conferred on them by statute) if only by virtue of the authority which Ministers accord to their ideas.

In its *more* extreme forms, this approach degenerates into allegations that officials band together in a conspiracy to seek power. Some *less* extreme versions of the power approach are very close to the subject of this conference – the exercise of discretionary powers. The entire theme of C. S. Hyneman's comprehensive book on United States administration, 'Bureaucracy in a Democracy',[6] is that *a bureaucracy must be judged by the way it uses its power*. And K. C. Wheare, reviewing Hyneman's book,[7] has argued that not all state employees are bureaucrats. Quite apart from employees engaged in state trading activities,[8] who are hard to classify, he does not think that public servants such as manual labourers or those who perform other kinds of routine tasks are bureaucrats. The bureaucracy consists only of those public servants who 'regulate, direct and control'. This test very nearly amounts to designating as bureaucrats those public servants who are in a position to exercise administrative discretion.

Finally, what does the man in the street mean by bureaucracy? Mr Riddiford will represent some of the views of the Public in his contribution, but he will no more present them in their raw state than would an advocate consider actually impersonating a client. One difficulty is that the publicized attacks on bureaucracy, in letters to the papers or in speeches reported in the Press, are not made by a cross-section of the population. They are voiced by quite knowledgeable people, accustomed to making articulate protests, who think they are being unfairly treated by the Government or that they are being too heavily taxed. Some of the complaints are not about power: the size of the departments is 'quite out of

[6] (Harper, New York, 1950.)

[7] *Public Administration* (London), Vol. XXIX, no. 2 (1951), p. 144. See also his inaugural lecture, 'The Machinery of Government' in *Public Administration*, Vol. XXIV, no. 2 (1946), p. 75.

[8] On Mises' definition of bureaucrats as administrators producing goods or services which have no cash value on the market, these would be the only Government employees who were *not* bureaucrats. L. von Mises, *Bureaucracy* (Hodge, 1945).

proportion'; the Government is insatiable in its demand for staff; civil servants are slow; annual picnic days in the Public Service play havoc with efficiency. However, the *power* of officials is also a favourite theme; the Government places too much reliance on its advisers, 'too many public servants possess, or presume to possess, too great powers which they seek to exercise behind the shield of the Minister'. Such attacks directly concern the power of officials and the use of administrative discretion. They must be taken seriously, although usually, when asked to substantiate their charges, the attackers are too chivalrous to press home their thrusts by providing evidence. The recently-formed Constitutional Society for the Promotion of Economic Freedom and Justice in New Zealand is also concerned with the power of officials, because part of its work will be 'to free New Zealand from bureaucratic control . . '

The two attacks on the Public Service, that it is dangerous because it is big and because its high officials seek power, do not reinforce each other. The larger the Service, the more influential will public service organizations become as interest groups. But it is improbable that these large groups will co-operate with the élite of the Public Service, at Permanent Head level or near it, who would be the people most likely to want power and in the best position to wield it. Even the élite is unlikely to co-operate as a body; to suppose that it would, is as unrealistic as James Burnham's assumption in *The Managerial Revolution,* that an assortment of loosely-defined 'managers' will tend to act together.

It is apparent that the topic of the discretionary powers of public officials is an important aspect of the general question of bureaucracy; it is a theme which has been widely discussed in other countries, and which is also highly relevant in New Zealand today.

FUNCTIONS OF THE STATE

For two reasons, it is now necessary to say something about the development of the functions of the State. Unless the growth in functions is borne in mind, it is difficult fully to understand the reasons for the growth in the number of public servants. Also, during the last twenty years or so there has been a marked increase in economic control functions, a field where there is particularly wide scope for administrative discretion.

For convenience, state functions may be classified under various headings, for instance:

(1) protective, the maintenance of law and order (including defence);

(2) social services, or welfare;

(3) economic regulation (including stimulation).

Other categories may be added, such as trading functions. Of course, depending on the intention behind a function, it might be placed in more than one category. Thus, liquor licensing in New Zealand (which fifty years ago Dicey said might 'make sobriety compulsory' here) could be classified under any of the three headings.

Nevertheless, taking these three groups of functions–protective, social services and economic regulation–a rough pattern of development can be detected. Usually the protective function came first, indeed, on any social contract theory this would seem to be the very *raison d'être* for the acceptance of Government. However, sometimes a Government has not performed even this minimal function. In the Mogul Empire, before the British arrived in force in India, 'merchants who complained they had been robbed were told the officials were there to collect revenue not to protect those who could pay to protect themselves'.[9] And in ancient Egypt public and collective regulation of waterways, with its attendant bureaucrats, came first; it was followed by 'the extraordinary construction activities which were organized militarily'.[10]

It would be tedious to trace the pattern of historical development in further detail. But, glancing at a single Western European country, England, we can see a good deal of state activity in the Middle Ages and afterwards until about 1770. Then, for roughly a century, there was a period of comparative *laissez-faire*, followed by a collectivist era, when state functions rapidly and dramatically increased.

The Middle Ages were particularly addicted to economic regulation. In order to follow certain trades, long apprenticeships were required. Gold was kept from leaving the country–Herbert Spencer mentions a law of Edward III by which innkeepers at seaports were sworn to search their guests to prevent the export of money or plate.[11] There was frequent debate about the 'just price' and about usury and the rate of interest. Even during the so-called

[9] P. Woodruff, *The Men who Ruled India,* Vol. I, *The Founders* (Cape, 1954), pp. 51-2.

[10] Weber, *op. cit.,* p. 212.

[11] *The Man versus the State* (Williams and Norgate, 1884), p. 8.

laissez-faire period (c. 1770-1870) state activity by no means ceased. But towards the middle of the nineteenth century (and the time of the first sizeable settlements in New Zealand) England was on the threshold of a new 'collectivist' era. The growth of the factory system, the development of steam power, the concentration of population in the cities, recurrent epidemics, the formation of labour associations, all raised problems that could not be solved by impersonal market forces; the 'invisible hand', with all its magic, could not cause them to disappear. The State therefore began to intervene, at first mainly through health acts and factory acts. Bentham's principle of utility, which had previously called for the removal of restrictions on individuals, now demanded that the State itself should act.[12]

Two points in this summary are particularly relevant to the development of state functions in New Zealand. First, economic regulation, which has been so prominent in New Zealand over the last twenty years, was not new in principle, but had been practised extensively in the Middle Ages. Second, when New Zealand was first settled, the *laissez-faire* period in England was nearly at an end, and some factory and health legislation had already been passed. The early colonists had already seen the State in action in these spheres.

However, there were some features in this country which were especially propitious for Government action. The delays suffered by the early settlers in acquiring land made them for a time dependent on the Governor or the New Zealand Company for relief work or food.[13] Lipson [14] also suggests that, whereas in older countries there are established social structures which balance, or even dominate, the *political* structure (the State), this was not so in New Zealand, which was a 'new' country. Here, starting from scratch, the political structure took the lead. In Siegfried's phrase, there was 'no one else to turn to' but the State.[15] Indeed, because of New Zealand's small population, the individual did not feel the State to be alien to him, and he was not *afraid* to turn to it; in

[12] See K. J. Scott, 'The Political Theory of the Social Service State', *New Zealand Journal of Public Administration*, Vol. 17, no. 1 (1954).
[13] Ruth Allan, 'The Politics of Equality' (review article), *Historical Studies, Australia and New Zealand*, Vol. 4, no. 15 (1950), p. 228.
[14] *The Politics of Equality* (Univ. of Chicago, 1948), p. 148.
[15] *Democracy in New Zealand* (Bell, 1914), p. 54.

doing so he remained confident of preserving his own individual energy and initiative.[16]

Moreover, development of the new country, by the construction of roads, bridges and railways, needed capital, most easily provided by the Government, which could borrow abroad at lower rates. The 'development' theme also explains why the State assumed, early on, the public ownership and disposal of unoccupied lands and the control of immigration. Also, in order to reduce high interest rates, the State sometimes assumed financial trading functions, for instance by the Advances to Settlers Act (1894) and the State Fire Insurance Act (1903).

All these things help to explain the predisposition towards state activity in New Zealand. Indeed, it is only too easy to try to explain too much. Siegfried and Métin,[17] writing of New Zealand as it was at the start of this century, are perhaps indirectly to blame for this. Siegfried referred to the New Zealander's 'mania for appealing to the state' and to the recent 'perfect debauch of laws, measures and experiments'.[18] But these commentators were describing a period, the 1890's, which was exceptional for state activity. Siegfried and others also coloured a picture of New Zealand as a social laboratory. However, it has been pointed out that probably the experiments performed here would soon have been tried out by other countries, anyway,[19] irrespective of what occurred in New Zealand. Furthermore, when any particular social experiment or reform is scrutinized it usually appears that this was not quite the first country to adopt it; in the language of the Olympic Games, in the race for social reform New Zealand has qualified for silver and bronze medals rather than for gold ones. Indeed, in the matter of state control of banking New Zealand twice *rejected* the opportunity to experiment.[20]

[16] W. P. Reeves. *State Experiments in Australia and New Zealand,* Vol. 1, p. 49. At pp. 61-62 he contrasts the Australian and New Zealand attitudes towards the State with the 'distrust of a strong interfering central authority' in the United States. For further accounts of the growth of state functions, see Reeves, *The Long White Cloud* (Allen and Unwin, 4th edn., 1950) and J. E. le Rossignol and W. D. Stewart, *State Socialism in New Zealand* (Harrap, n.d.).

[17] *Le Socialisme sans Doctrines* (Paris, 1910).

[18] *Op. cit.,* pp. 52 and 58.

[19] J. C. Beaglehole, *New Zealand,* p. 138.

[20] In 1856, when the state bank set up in 1850 was abolished, and in the financial crisis of 1894-5. See J. B. Condliffe, *New Zealand in the Making* (Allen and Unwin, 1930), pp. 295-6 and 320ff.

In the history of state action in New Zealand two peaks stand out in relief. One, which so impressed Siegfried, Métin and others, was under the Liberal government from 1890 until about 1900, when Seddon's energy was diverted into imperial channels. Its highlights were the act of 1894 setting up a system of industrial conciliation and arbitration and the Old Age Pensions Act of 1898. Departments of Labour and Agriculture were also created, mainly for the relief of unemployment and to help farmers to pool their experience, respectively.

The other great increase in state activity began with the formation of a Labour government in 1935, and lasted until about the end of the war. Before 1939 the trend followed two main directions. Social services were expanded, especially by the comprehensive Social Security Act of 1938. Secondly, there was also widespread economic intervention; for instance by the Industrial Efficiency Act, 1936, which made entry into certain industries subject to licence, by legislation in 1936 on marketing and by the imposition of import control and foreign exchange control in 1938. The new marketing policy, which included a guaranteed price for dairy farmers, and the import and exchange controls were both largely attempts to 'insulate' New Zealand, a vulnerable primary producer, from external economic influences. With the outbreak of war, the 'protective' function of the State became predominant. But it also stimulated the other functions in some directions; thus war made it necessary to extend existing price control (1939), to control building (1939) and capital issues (1940) and to introduce land sales control (1943). The war also brought forth a comprehensive rehabilitation scheme. At the end of this second period there was a short burst of legislative activity, when civil aviation and the Bank of New Zealand were nationalized. Since that time there has been no spectacular change in the amount of state activity; the peak has become a plateau.

With greater state activity the size of the Public Service has also increased. The rise in numbers was particularly marked after 1935 and during the Second World War.

THE INEVITABILITY OF DISCRETION: THE FIELD OF ECONOMIC REGULATION

To turn to the question of administrative discretion, from one point of view, the discretion exercised by an official arises from his Minister's inability to make *all* the decisions required by the

work of the department. Supposing that some New Zealand Minister with super-human energy contrived to accomplish this (and I understand that some have made a very good try), the necessity for administrative discretion would remain. The only consequence would be that the *Minister* would exercise the discretion–*not the officials*. In fact, as Mr Baker's paper describes, discretion is *shared* between Minister and officials. Discretion, as such, is not rendered necessary by the number of decisions that has to be made in a department, but by the impossibility of laying down fixed rules in advance that, without further interpretation, will cover all particular cases. The scope of modern Government is so wide, its subject matter so complex and its problems so interrelated, that it is simply not practicable to legislate in detail for the future. This is a well-known theme. In the language of Mr Justice Holmes, 'General propositions do not decide concrete cases'. It is significant, however, that, having said so, Holmes proceeded, consciously, to do just this, to argue from a general proposition.

The British Committee on Ministers' Powers was confronted by one particular aspect of this problem. Why was it impossible to cover all eventualities in acts of Parliament without having to resort to the use of delegated legislation? Briefly, it found that the answer lay in the pressure on parliamentary time, the technicality of the subject matter, the possibility of unforeseen contingencies, the need for flexibility, the opportunity for experiment and, at intervals, the necessity for emergency powers.[21] By and large, this analysis is valid, not only in explaining the need for delegated legislation, but also in explaining the inevitability of administrative discretion *generally*. Cardozo's account[22] of what a Judge does, is, in this context, also descriptive of the administrator's task, 'He fills the open spaces in the law. How far he may go without travelling beyond the walls of the interstices cannot be staked out for him upon a chart'.

Consequently, it would be wrong to think that statutes left room for administrative discretion only because they were not long enough or explicit enough, or because they were badly drafted. It

[21] *Report of the Committee on Ministers' Powers* (Cmd.4060, 1932), esp. pp. 51-53.

[22] 'The Nature of the Judicial Process' in *Selected Writings of Benjamin Nathan Cardozo* (Fallon, N.Y., 1947), p. 154. See also E. P. Herring, *Public Administration and the Public Interest* (McGraw Hill, 1936), p. 24.

would also be wrong to think that delegated legislation permitted administrative discretion only for similar reasons.

Administrative discretion is not confined to Government, it is also inevitable in medium-sized and large private organizations. But it is especially important that it be exercised wisely in Government. Except where a marked degree of monopoly exists, a dissatisfied *customer* can in the last resort do business with some other firm; a dissatisfied *citizen,* who has exhausted all legal and political remedies, has no other alternative, short of emigration.

Officials are responsible for exercising discretion in all of the three spheres of Government activity–protective, social services and economic regulation. For instance, the policeman on his city beat, or, at least until recently, investigating the closing hours of licensed premises on the West Coast, uses discretion on whether to take action in particular cases. But perhaps the most complex field in which administrative discretion is exercised is that of economic regulation, for example the control of imports, price control, the regulation of capital investment and (until early this year) the restrictions on building. This is a comparatively new development.[23] It is, of course, impossible to define 'economic regulation' precisely, but certainly in New Zealand it has come into extensive use only during the last twenty years or so. Many of my illustrations concern economic regulation, as do many of Mr P. B. Marshall's. However, I am not concerned to argue the case for or against economic regulation. I discuss the problems of exercising economic controls because they are relevant to the theme of the book; I ignore the problems of *omitting* to exercise control because they are *not* directly relevant.

Administrative discretion in this sphere is particularly complicated, perhaps for two main reasons. First, the decisions made must be in conformity with the Government's general economic policy. This is always liable to fluctuate from time to time in accord with the degree of inflation, the amount of unemployment, export prices and so on. New Zealand, as a primary producer, can adjust herself to economic influences from abroad only by being economically

[23] Perhaps the new type of economic regulation differs from mediaeval and Renaissance economic regulation in several ways: it has to make more distinctions, e.g. between various types of product; it is more thoroughly enforced; there is more organized protest if it is apparently unfairly applied. It will be recalled that in Spencer's example it was the inn keeper who was to search the departing travellers for gold, not an official.

acrobatic at home.[24] Moreover, the operation of some of these economic controls has to be co-ordinated, for instance control of capital issues, the raising of loans by local bodies and (formerly) the control of building. Indeed the working of a *single* control may call for co-ordination between different Government authorities. Perhaps *more* co-ordination is required. It has been stated that on one occasion, when the Board of Trade[25] had used its discretion to make a recommendation on tariff exemption for certain road-graders, which was accepted by the Minister, there was then considerable delay while the Customs Department, which is under the same Minister, performed what seemed to it to be its duty by going through the process of exercising *its* discretion.

Second, in this sphere administrative discretion often raises openly and brutally the question of who gets what–and who doesn't get what. Authorized rises in price are at the expense of the consumer; permission to invest will probably ultimately be to the disadvantage of a rival firm; an import licence for a larger amount acquired out of a fixed allocation will mean licences for smaller amounts for competitors. Indeed, in the matter of imports, there may be a further conflict between one New Zealand manufacturing industry, which wants protection for its product through import licensing, and another industry which wants to import the product freely because it is a raw material for the manufacture of its *own* product.[26] Those who get less than they expected are likely to resent it, and their rancour will be directed, at least in the first instance, not towards natural or external forces, such as the weather or a world depression, but against an identifiable Government organization or organizations.

[24] For a similar view on Britain's economy, see G. D. N. Worswick, 'Direct Controls' in G. D. N. Worswick and P. H. Ady (Eds.) *The British Economy, 1945-1950* (Oxford, 1952), p. 310.

[25] The Board of Trade was constituted under the Board of Trade Act, 1950, and may consist of up to four members. The functions of the Board are advisory except for delegated powers regarding industries or trade. The Board has the powers of a Commission of Enquiry and is responsible to the Minister of Customs. Main matters of concern to the Board are the operation of the Customs Tariff and the effect of import licensing and Customs duties on the economy of the country.

[26] For instance, the conflict between the N.Z. manufacturers of laminated undercarriage springs for motor vehicles and the N.Z. motor vehicle industry. See 'Review of the Activities of the Board of Trade to 30th June, 1954', *Appendix to the Journals, House of Representatives 1954, H-46*, p. 12. Numerous other similar conflicts of interest exist, for instance between the woollen mills and the clothing manufacturers, between the tanneries and the footwear and handbag manufacturers, etc.

LIMITING DISCRETION AND SEARCHING FOR STANDARDS

The wide scope of discretion sometimes given to administrators is plain from the very general nature of some of the criteria or principles laid down by legislation or ministerial direction. In the tax field, terms such as 'depreciation' may seem definite enough to a layman, but, without further qualification, may be hopelessly imprecise for purposes of administration. Rates of depreciation for tax purposes could not be prescribed in rigid detail by statute or regulation so as to cover the wide variety of assets in existence and the varying conditions under which they are employed. Therefore, provisions on depreciation in statutes or regulations leave considerable scope for interpretation and discretion.

In such circumstances the administrator must search for standards, both for an 'internal' reason and for an 'external' reason. Inside the organization standards make it easier to handle a large number of cases, for instance by delegation. Externally, standards help the Public by reducing uncertainty, a point which will be developed later.[27]

Occasionally, not only are no fixed standards given, but it is hard to frame any on the basis of what *has* been given. In 1954 the Price Tribunal[28] considered the circumstances under which goods and services should be exempt from price control under the Control of Prices Act, 1947. From the Act's provisions it concluded that when it fixed prices for goods or services they must be 'fair and reasonable'.[29] It was therefore of the opinion that it could exempt goods and services from control, where it was unlikely that exemption would result in prices being raised to an unfair or unreasonable figure. But it was unable to specify exactly the conditions in which this might happen. It might occur where there were shortages of particular goods or services, or where,

[27] See Ch.IV, 'Program Development in Administration' in E. S. Redford, *Administration of National Economic Control* (Macmillan, 1952).

[28] The Price Tribunal was constituted by the Control of Prices Emergency Regulations, 1939 and ratified by the Control of Prices Act, 1947. The Tribunal is independent, and its seal is judicially noticed in all courts. Members are appointed by the Governor-General on the recommendation of the Minister of Industries and Commerce. The functions of the Tribunal are: (a) to fix prices; (b) to investigate complaints; (c) to prevent profiteering and exploitation of the Public. The Minister of Industries and Commerce decides what goods are to be subject to price control.

[29] Decision No. 3592 of the Price Tribunal, Wellington, 21st June, 1954. For American problems in setting standards for price control, see H. C. Mansfield and Associates, *A Short History of OPA* (Government Printing Office, Washington, 1949).

without price control, competition would not be free enough to regulate prices effectively. But the Tribunal was unable to assess the weight to be given to the factors which might prevent competition. It could only *list* them, and say that where one or more of them existed there was a *prima facie* case for price fixation 'unless the surrounding circumstances are such in any particular case as to satisfy the Tribunal that there is no need to fix prices'.

Another aspect of the problem may face the administrator; when he is given two or more criteria, if they clash, which should prevail? By 1950, import licensing was said to have two objectives, conservation of overseas funds and assistance to local manufacture. The objectives were 'sometimes inter-dependent'.[30] On the occasions when they diverged, how much weight was to be accorded to each?

In setting standards for future guidance the senior public servant is *limiting* his own and his subordinates' discretion in subsequent decisions.[31] Indeed, this is a result of bureaucracy, as defined by Weber. To the extent that Weber's features, hierarchy, responsibility to a superior, use of definite rules and procedures and so on, are present the range of possible decisions is narrowed. To the extent that these features are absent, for instance in countries with 'primitive' governmental organizations, numerous officials have wide discretion which they often exercise capriciously.

As Mr P. B. Marshall maintains in his contribution, decision-making in the early stages of a new programme is exceptionally hazardous.[32] It is paradoxical, but obvious, that often the administrator cannot work out satisfactory standards for making decisions on particular cases until (without the help of these standards) he has *made* some decisions on particular cases. Time must elapse before, on the basis of experience and with the help of interested groups, he can build up the equivalent of a body of case law, yet during that time decisions may still have to be taken. Thus, when the Tax Commissioner is given discretionary power under a new enactment, decisions are in fact referred to the Commissioner

[30] 'Import Licensing in New Zealand: A Review' (Statement by Hon. C. M. Bowden, Minister of Customs), *Appendix to the Journals, House of Representatives, 1950, J-4,* p. 1.

[31] Members of the Public often resent the fact that subordinate officials have *too little* discretion. See p. 127, below, and R. K. Merton, 'Bureaucratic Structure and Personality' in A. W. Gouldner (Ed.) *Studies in Leadership* (Harper, 1950), pp. 72-3.

[32] P. 133, below.

himself until the actual working of the provisions makes it possible to promulgate a reasonably comprehensive code. Also, the Board of Trade, at the beginning of its tariff inquiries (1952) declined, understandably, to accede to the New Zealand Manufacturers' Federation's request for a statement of the principles the Board would follow in making its tariff recommendations. It held that 'any statement in advance of experience would be largely theoretical and might be embarrassing as time went on. The Board was of the opinion that its principles would emerge as problems were met and in the course of time, when a number of reports were published, the Board's principles would become clear'.[33]

Once standards have been set, delegation is possible. The simpler cases, easily resolved in terms of the standards, can be dealt with relatively quickly on lower levels, while the more awkward problems are decided higher up. Delegation of this kind is general in New Zealand in a variety of fields, such as Income Tax, the administration of Crown Lands, the loans programme of the Rehabilitation Department and (formerly) building licensing.

Although discretion may be limited by evolving standards, it cannot be eliminated altogether. As far as economic regulation is concerned, administrators are attempting to move towards a number of different objectives at the same time. The objectives: full employment, prevention of inflation, protection of local industries, freedom of choice for consumers and so on, may often conflict, and their relative importance is liable to change.

In descending order of generality, principles, standards or rules and individual decisions should be based on these objectives and on the relevant facts. The large number of objectives to be borne in mind and the difficulty of determining the exact weight to be attached to each, once more illustrates the extreme complexity of decision-making in the field of economic control.

Individual administrators, or particular groups of administrators, may come to different decisions, simply because they assign different weights to various objectives or principles, and therefore arrive at different value judgments.[34] They are all seeking the public interest, just as many of King Arthur's knights sought the Holy Grail, but their personal qualities and varied experience

[33] 'Review of the Activities of the Board of Trade to 30th June, 1954', p. 21.

[34] Cf. Mr Cooke's account of judicial interpretation, pp. 96-7, below.

make them pursue it by different paths and involve them in different adventures. Some pioneers of scientific management tried to discover the 'one best way' of performing relatively simple manual operations. But, if only because value judgments are so prominent, it would be unrealistic to believe that, in economic regulation, there is always 'one right decision'. I think that this argument is supported by what we have learned from case studies in public administration. Even with the advantage of hindsight it is sometimes impossible to point with certainty to the single 'right' answer.

In maintaining that sometimes there is no 'one right decision', the last thing I wish to suggest is that the search for standards is fruitless. Unless, in the words of one administrator, officials constantly try to find a line of policy in each item, economic control will degenerate into an untidy heap of *ad hoc* decisions. I am only sounding the warning that to travel hopefully towards the public interest does not always ensure arrival.

It might be imagined that where administrators succeed in setting their standards partly in numerical form, they have managed to eliminate value judgments. Consider the ingenious 'points' system, which Mr P. B. Marshall's paper describes at greater length.[35] Briefly, in allocating licences for certain imports, after consultation with trade organizations, each importer was allotted a number of points, according to whether he was a major wholesaler, medium wholesaler, large retailer and so on. Applications for licences were then granted in proportion to the number of points.[36] This is a useful administrative device, which has been employed elsewhere in other forms. The Board of Trade itself merely claimed that the system 'appeared to provide a reasonably fair division of the licences available'. But it does not absolve the administrator from having to make, and apply, value judgments about the *composition* of the groups, and the number of points to be given to members of each group, although once the points have been allocated the scheme is arithmetically sound. What has happened is merely that the process of applying value judgments has been pushed back a stage.

The importance of value judgments in economic regulation perhaps throws some light on a vexing question. There is a belief

[35] See p. 125, below.

[36] 'Review of the Activities of the Board of Trade to 30th June, 1954', pp. 15-16.

that sometimes persistence by an applicant results in his receiving preferential treatment from officials. Thus, more energetic firms are said to have legitimately profited from *supplementary* allocations of import licences, which were not pursued so actively by their rivals. At first sight, such suggestions might appear to discredit the administrators concerned. Can they really be influenced by the process of 'wearing out the carpet'? Perhaps they can, but it does not follow that the harmful inference is justified. In coming to a decision in a particular case the administrator has to relate the facts to principles and rules. But he may not have perfect knowledge of *all* the facts that might be relevant to the complex of principles and rules.[37] The delicate balance of the numerous elements in the original decision may be altered by an applicant's full and personal presentation of the circumstances. Therefore, quite properly, the decision may sometimes be altered, to the applicant's advantage.

THE PUBLIC AND ADMINISTRATIVE DISCRETION: PUBLICATION OF RULES

The argument so far has been presented mainly from the administrator's standpoint. But consider for a moment the effects on the persons administered. It is immediately plain that the exercise of administrative discretion, as we have described it, is in apparent contradiction to Dicey's first conception of the Rule of Law, which Dicey contrasts with 'every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint'.[38] This requirement is analytically distinct from his second conception, which is that every man, whatever his rank and condition, is subject to the ordinary law of the realm administered by ordinary tribunals. In the past, it is probably this second test, and the consequent debate on administrative tribunals, developed further in Mr Cooke's paper, which has caused most controversy. But Professor Corry has recently insisted that the first is the more important. It is the existence of fixed and objective standards for taking decisions that matters, not the name or the formal procedure of the body which takes them: 'the really serious situations are those

[37] Where the number of persons affected by a control is small, it may be possible for officials, as a regular practice, to seek out the relevant facts from all of them.

[38] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th edn., 1931), pp. 183 ff.

in which the government insists, and persuades Parliament to authorize it to insist, that issues arising between it and the citizen must be dealt with by some executive agency (usually a minister) not according to rules fixed beforehand but in the discretion of that agency in the light of the circumstances at the time the issue arises'.[39] Corry was writing about Cabinet Government, mainly in Canada. But it has also been held important in Britain and the United States, in the last few years, that administrative agencies should define their rules, criteria and standards.[40]

On this view, one important reason for defining and publishing rules is that the law should be clear enough to permit individuals to plan for the future. Uncertainty, as Adam Smith believed when he formulated his maxims on taxation, is an evil.[41] However, there may be times when it is impossible to fix and publish rules in advance. On the occasions when New Zealand has to adjust herself to external economic changes, then standards and rules may also have to be drastically adjusted. The new rules cannot be announced far in advance of the date when they will take effect.

A further restriction on publication is the need to keep secret information given by members of the Public–say by applicants for licences. To cite illustrations of how general principles were applied to a firm, even if no names were given, might help its business rivals.

The operations of the Capital Issues Committee will serve to substantiate the difficulty of publishing rules. The Committee was set up in 1952 to take over previously existing powers of capital control, and acts under powers delegated to it by the

[39] J. A. Corry, 'The Prospects for the Rule of Law', *Canadian Journal of Economics and Political Science,* Vol. XXI, no. 4 (1955).

[40] See W. A. Robson, *Justice and Administrative Law* (Stevens, 3rd edn., 1951), Ch. 5; also the United States Administrative Procedure Act, 1946 and the Commission on Organization of the Executive Branch of the Government (Hoover Commission) *Task Force Report on Regulatory Commissions (Appendix N),* January, 1949.

[41] See Ernst Freund, *Administrative Powers over Persons and Property* (Univ. of Chicago, 1928); James Hart, 'The Exercise of the Rule Making Power' in *The President's Committee on Administrative Management, Report with Special Studies* (Washington, 1937); W. A. R. Leys, 'Ethics and Administrative Discretion', *Public Administration Review,* Vol. III, no. 1 (1943), pp. 10-23.

It should be noticed, too, that one of the purposes of economic regulation is to *reduce* the uncertainty resulting from the free play of 'natural' economic forces.

Minister of Finance.[42] Its basic function is to decide priorities for distributing new finance for investment. The committee's operations have the aims of relieving pressure on the capital market, reducing excess demand for labour and materials and helping to keep down interest rates.[43] When it was appointed, the following rules were laid down for it:

> 'Each application will be considered on its merits, but consent to the issue will probably be given in the following cases:
>
> (a) Where no recourse to new finance is involved. . . .
>
> (b) Where a substantial increase of exports or saving of imports will result, either directly or indirectly.
>
> (c) Where substantial shortages of essential goods will be met.'[44]

The interpretation of this direction hinges, of course, on such terms as 'substantial increase', 'substantial shortage', 'essential goods' and so on. The last is especially puzzling. Does essential mean 'essential to life', 'essential to the New Zealand standard of living', or what? Is it to be narrowly construed because, unlike (b), it does not include the phrase 'directly or indirectly'? In the early days of the British National Coal Board attempts were made to increase the output of 'essential' coal by allocating most of the available output of 'inessential' nylon stockings to mining towns. Would the Capital Issues Committee be likely to consider, say, beer as an essential good? Probably not–applications for new finance for hotels and breweries were regarded as being of 'lower priority', although the Committee would take account of the need to expand business 'in conformity with the demands of an increasing population and the other normal changes in demand'.[45] But perhaps, if the shortage were substantial enough, and the people's voice were raised loudly enough, the Committee might be persuaded to regard beer as essential.

Suppose, however, that the Committee *did* draw up a priority list for various industries, there would not, even then, be any

[42] *Royal Commission on Monetary, Banking and Credit Systems, a Statement by the Capital Issues Committee, Wellington, 1955,* p. 1.

[43] *Ibid,* p. 3.

[44] *Ibid, Appx.B (Press Statement by Associate Minister of Finance issued on 3 April, 1952).* For the broad principles laid down for the British Capital Issues Committee, see 'Government Control Over the Use of Capital Resources', *Midland Bank Review,* August, 1950.

[45] *Ibid,* p. 4.

certainty about which applications would be granted in the future. The total value of investment requested in the applications varies from year to year, and so does the amount granted by the committee.[46] For instance a stricter policy came into force at the end of 1954, and for the first quarter of 1955 the value of the declined or deferred applications for *new* finance was nearly as great as the value of the approved applications; in previous years it had been less than half as great. In short, quite apart from the way in which the Committee decides to *divide* the cake, it does not have sufficient information to say in advance how big the cake for the next period is going to be. In reading through the evidence given by the Chairman of the Capital Issues Committee before the Royal Commission on Monetary, Banking and Credit Systems,[47] the impression is gained that it would be almost impossible for the Committee to publish any rules for the guidance of applicants, which would not be provisional and temporary. The confidentiality aspect is also important. The extreme lack of publicity about the Committee's deliberations[48] is perhaps partly accounted for by the small number of applications it has to consider, compared with some other bodies administering economic controls.[49] Information disclosed could be relatively easily attributed to the individual firms concerned.

The same considerations which prevent publication of standards and rules also make it difficult or impossible to explain the *reasons* for some decisions. Because New Zealand's economic position has changed, a firm may need to be treated differently for say, import licensing in 1957 than in 1956, even although *its own* circumstances are apparently similar. But how are the firm's directors to be satisfied that this is a fair and not an arbitrary decision, unless their knowledge of the economic situation and of economics is so extensive that it overcomes their natural self interest? Or suppose that several rival firms are given *proportions* of the total

[46] *Ibid, Appendix D.*
[47] *Record of Proceedings,* Vol. XIII, pp. 3691-3745.
[48] *Ibid,* pp. 3738-9.
[49] Although the average *value* of an application is high. The following comparison is for 1956.

	No. of Applications Approved	*Value of Applications Approved*	*No. of Applications* NOT *Approved*	*Value of Applications* NOT *Approved*
Capital Issues	679	£36,479,000	108	£9,628,000
Building Licences	55,863	£96,959,000	215	£7,943,000

1957 allocations of licences which differ from the 1956 proportions. How could a firm, whose proportion has dropped, be reconciled to the alteration without the disclosure, in many instances, of confidential details about other firms?

PROBLEMS EVEN WHEN STANDARDS ARE SET

Of course, setting standards, although it helps to remove uncertainty, does not solve all the administrator's problems. Objection may be taken to the *way* in which officials have used their discretion in arriving at certain standards. During the last war, it was decided that in order to be eligible for Rehabilitation benefits (other than reinstatement benefits), an applicant had to satisfy at least one of three conditions–to have served in action, to have served in a battle zone for six months or to have served outside New Zealand for twelve months. But the Returned Services' Association argued for some years that this was too severe a basis for eligibility. Nor did the 'points' system, mentioned above, satisfy everyone. The Board of Trade realistically commented that 'naturally some classes of traders considered they should have received higher amounts'.

Greater certainty, achieved through setting standards, may also conflict with the need for *flexibility*. 'Basic' import licences have been issued for some commodities which are related to the licences issued to the importer for a previous period, and are nearly always for the same amount.[50] The importers concerned consequently find it easier to plan for the future. But they also come to believe that they have a *right* to the same amount as for the previous year. Except in a period where the *total* number of licences for these commodities is increasing, administrators may feel so circumscribed by these expectations that they are unable to correct anomalies, or make proper provision for new entrants into the field. This is yet another instance of a clash in principles, which can be resolved only by making value judgments–to what extent should flexibility be sacrificed in order to diminish uncertainty?

SAFEGUARDS FOR THE PUBLIC: MINISTERIAL CONTROL

To summarize the argument so far; senior officials inevitably exercise administrative discretion. Setting standards and making rules eliminate *some* of it. But there is a residue of discretion,

[50] 'Review of the Activities of the Board of Trade to 30th June, 1954', Appx. C and 'Import Licensing in New Zealand: A Review', p. 2.

and in some situations there is no 'one right decision'. In the field of economic regulation, especially, the Public may resent the lack of definite published rules, the absence of adequate reasons for decisions and the way in which discretion is exercised in setting standards. Under these conditions what safeguards has the Public that officials do not abuse their discretionary powers? Mr P. B. Marshall gives a vivid account of the internal checks and procedures in departments to insure that discretion is responsibly exercised. It is essential, for example, that the same officer or officers should not both make a decision and consider the appeal from it. This was sometimes the practice in import licensing before 1950.[51] To the degree that checks and procedures exist and demonstrate that administrators are striving to act judicially,[52] then discretion is *not* being exercised arbitrarily, in an important sense of the word. Although civil servants cannot always give reasons, their actions can still indicate honesty and integrity to such a degree that they win the confidence of the Public.

Apart from internal checks and procedures, a member of the Public has additional safeguards to ensure that he is not treated notably worse than others in similar situations. Often he can consult professional men, closely in touch with the relevant department, who (for a fee) will tell him what the current practice is. It is well known that accountants perform this function on tax questions; less obviously, certain lawyers, accountants and share-brokers do it for capital issues; architects used to do it for building licences. There has even been a handful of 'expediters' for import licences.

There is also the safeguard of an appeal to the Minister. Mr J. R. Marshall's paper is concerned with the Minister's point of view. I wish here only to refer to the fact that the *possibility* of appeal exists, and that it is freely used. It has been remarked that the Minister cannot formulate rules so water-tight that they will cover every conceivable case; officials therefore have to exercise discretion. Nevertheless, if the Minister is to retain responsibility for the acts of his officials, he must be prepared to review the use of their discretion by considering appeals.

[51] 'Import Licensing in New Zealand: A Review', p. 7.
[52] Cf. W. A. Robson, *Justice and Administrative Law*, Ch. 5.

There is, of course, a danger that some people may be unable to take advantage of the possibility of appeal. In immediately post-war Britain, with its jungle of controls, some members of the Public, exhausted by fighting the Axis and official forms, were ready to take 'no' for an answer, at the first time of asking, from quite subordinate officials. They lacked the knowledge or energy to take their case any higher on the official level, let alone to the ministerial level.[53]

However, it is hard to believe that this problem of breaking through the official barrier is anything like so serious in New Zealand. It is a maxim of New Zealand government, no doubt deriving from its small population and its traditions of equality, that the Minister is approachable. Rulers such as Haroun-al-Raschid and James IV of Scotland are reported to have gone among the people in disguise to find out what they were thinking; the typical New Zealander goes to the Minister and *tells* him what he thinks.

Of course, free access to a Minister does not imply that he will fully reconsider all official rulings. He will be briefed by his officials, sometimes by the same ones who gave, or later sustained, the original decision. He just does not have enough time to go into the reasons why most decisions were made. If he *does* investigate the reasons, he will still probably agree with his officials, because, as members of a team, Ministers and officials will probably naturally tend to think along the same lines. Less frequently, a Minister may reverse a decision. On occasions, because he is a politician, he may be lenient to an applicant for political considerations. A comment on price fixing during the first World War was that 'the actual price fixed depended on the influence the producer had with the government'.[54] Also, the number of large business firms in New Zealand is so small that a Government might find it hard to resist a firm's suggestion that, unless its products were protected by tariffs or import licensing, it would discontinue operating in New Zealand and consequently cease to employ New Zealanders.

Nevertheless, with all these qualifications, and even although they may distract the Minister from policy-making, appeals are an essential check on the discretionary powers of officials.

[53] *Report of the Committee on Intermediaries* (Cmd. 7904, 1950), pp. 40-41.
[54] W. P. Morrell, *New Zealand* (Ernest Benn, 1935), p. 259.

CONCLUSION

Once upon a time decisions were simple; the original human decision was whether to eat the apple or not to eat it. Nowadays things are more complex and interdependent; before goods are consumed, discretion has to be used to make decisions about investment, building, imports, prices, taxation and so on.

Public servants have a rôle to play in the making of these decisions. It is dangerous for them to play too big a part, and there must be adequate checks and safeguards. But (as even Laski's definition of bureaucracy implies) they are entitled to exercise *some* of the power in our society, just like politicians, soldiers and sailors, farmers, businessmen, trade unionists and other groups. If this is 'bureaucracy', then their critics can make the most of it.

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THE DISCUSSION

Mr J. V. T. Baker wondered how public servants compared with their counterparts in private business and whether public and private administrators could learn from each other's experience. Professor Milne thought that they *could* learn from each other, this was illustrated by the successful executive management courses run by the New Zealand Administrative Staff College.

Mr D. Nixon asked how bureaucracy related to local government and to bodies such as public corporations; he pointed to the advantages of using elected local committees in local government, and recommended more decentralization. Professor Milne considered that last year's Convention had shown that there were too many small local bodies; he was in favour of more decentralization but only after reform of the local government system.

Dr A. Douglas said the Public should be told more plainly what rights of appeal existed; however, if more people appealed, the strain on Ministers might become intolerable.

Mr E. A. Missen commented on the fear that the more efficient the public servant became, the greater the potential menace to individual freedom.

There were two contributions from representatives of the Public. Mr J. Russell Hancock thought that some of the underlying antagonism to the Public Service resulted from the helplessness members of the Public felt in the face of officials' decisions, which they knew were almost always confirmed by Ministers. Mr P. J. Luxford,

Secretary of the newly-formed Constitutional Society, said that he admired individual public servants, but that there were weaknesses in the system, although he was not sure exactly how they could be remedied. Nevertheless abuses existed; a few decisions by administrators were probably *ultra vires,* but many members of the Public had told him that they were afraid to try and assert their rights, because they feared victimization. Professor Milne was glad that members of the Public were present and had spoken; he agreed that in some instances discretion might have been abused by officials, but he thought that the Constitutional Society was too extreme in its attack on existing procedures.

Public Servants as Ministerial Advisers

F. BAKER

In this paper my main objects are to review the relationship which normally exists between a Minister and his Permanent Head, to describe their respective fields of activity and to discuss the problems which each has to overcome in the execution of his particular part of the task of Government.

Before I go any further, however, I wish to explain that my selection for this assignment apparently results from the fact that, while I have been a Permanent Head, I am not one now. As it has become the practice in recent times for some senior officers to offer all kinds of criticism of governmental administration and thus be assured of hitting the headlines as soon as they cease to hold positions of responsibility in the Government Service, it was perhaps thought that I might take this opportunity for doing likewise. For instance, among the things it was suggested that I could discuss, was the question of how I handled a reluctant Minister and, to complete the record, how my Minister handled a reluctant Permanent Head. In my desire to please, I have done my best to unearth suitable material that would fairly fall within this category, but have to confess that I have not been able to produce any convincing examples. Nevertheless, there are many other aspects to the relationship between a Minister and his Permanent Head, and I will try, without breaking confidences, to cover these frankly in the time allotted to me.

In approaching this subject I have decided, first to give a brief outline of how my own organization (the Rehabilitation Board and Department) worked, and then to move on to general observations and conclusions based on my experience. While my remarks must be founded primarily on my own work as a Permanent Head, having been one for over ten years, I also had a good opportunity to consider the Ministerial-Permanent Head relationship of other departments, and particularly of those whose work was related to that of the Rehabilitation Board. To the extent that these seem relevant and I feel competent to judge them, I propose to draw on them in framing my later general remarks.

In a recent article, *Policy Making in New Zealand,* Mr H. G. Lang said:

> 'The extent to which public servants influence important decisions depends on at least four considerations: firstly, the respective personalities, and secondly, the experience of public servants and Ministers; a new government needs to rely much more on public servants than experienced Ministers would. Thirdly, the subject on which the decision is made; where a subject is highly controversial politically, Ministers will necessarily be concerned. Fourthly, the type of organization; constitutionally the Minister has less control over a public corporation than over a conventional department.'[1]

In the course of my remarks I will have something to say on each of the four points raised. Whereas, however, Mr Lang refers by way of contrast to the public corporation and the 'conventional' department, my observations will be made from experience within a different kind of organization, namely a board comprising senior Government officers and representatives of the general Public, presided over by a Minister of the Crown. While boards of this kind are not semi-independent, as are administrative tribunals and public corporations, the problems of Ministerial-Permanent Head relations are different from those where the departmental organization follows 'conventional' lines. Other features peculiar to the Rehabilitation organization were that the board had a bigger hand in policy making than is usual in such bodies–in fact its activities were virtually confined to policy, the administrative work being

[1] *New Zealand Journal of Public Administration,* Vol. 13, no. 2 (1951), p. 27. For a comparable Australian view see J. G. Crawford, 'The Role of the Permanent Head', *Public Administration* (Sydney), Vol. XIII, no. 3 (1954), pp. 153-165.

undertaken by departments (including the Rehabilitation Department) or by other bodies on an agency basis. It will thus be seen that my experience as a Permanent Head was not entirely in a typical department; to those interested in the study of public administration, this may give it an added value, particularly if, as I understand is the case, previous studies have been confined mainly to departments with a 'straight' Ministerial-Permanent Head relationship.

THE REHABILITATION DEPARTMENT; THE NEW REHABILITATION BOARD

To deal with my own experience, I could well start with the question: what were the respective spheres of activity of the Minister and myself? I should perhaps first indicate certain special features attaching to this appointment. First, only a few months before I was made Permanent Head at the end of 1943, an election had taken place at which the Government's handling of the problem of rehabilitation of ex-servicemen had been the subject of considerable criticism and discussion. Second, the problem was urgent, not only in the eyes of the two political parties, but also in the views of the servicemen's organizations and of the general Public themselves. Third, my appointment as Permanent Head was to a new department – I was actually number one on the staff register. Fourth, my appointment was contemporaneous with the creation of two new seats on the Rehabilitation Board, one for the new Minister, recently returned from overseas, as Chairman; and the other for myself, the Permanent Head, as Deputy Chairman. The board comprising five private citizens and the Secretary of the Treasury had been in existence for something approaching two years, and these two new appointments were to prove to be the first stage in its reconstruction, which was completed some few months later. The Rehabilitation Act, 1941[2] provided that, subject to compliance with government policy and to any directions of the Government given in writing by the Minister, the whole of the control and administration of activities under the Act were the responsibility of the board. I wish later to deal with certain aspects of the work of the board, and merely record the position here to be able to paint more clearly the picture of the Permanent Head's rôle in such an organization.

[2] Later amended by the Rehabilitation Act, 1944.

From the new Minister's point of view, there was a need to review general policy decisions already made by the original Board, and to extend operations into fields in which policy decisions had *not* been made. A number of schemes had been submitted by the original board to the Government, but, for various reasons, including the proposed reconstitution of the board already mentioned decisions had been deferred; also it was clearly necessary to co-ordinate certain activities of a few other departments. Before the setting up of this special board to deal with rehabilitation matters, these departments had been given direct authority from the Government to carry out work which now under the Act, was plainly part of the new board's responsibility. As examples of this, the Labour Department was conducting trade training for ex-servicemen as an extension of an existing adult apprenticeship scheme. The State Advances Corporation was providing loan finance to returned servicemen for homes and farms, but on margins of security and other terms closely approximating those applicable to normal borrowers. The Lands and Survey Department was using existing lands legislation to launch a scheme for the acquisition and development of land for the settlement of servicemen. The Social Security Department was administering a scheme of rehabilitation allowances, payable to men pending their absorption into appropriate employment.

The tasks to be handled called for the closest association between Minister and Permanent Head. Following lengthy preliminary discussions between the Minister and myself, during which relevant Government attitudes were allowed for, I undertook the responsibility of reviewing the whole field, and reported direct to the Minister on what should be done, how it could be done and who should do it. The Minister, after considering these reports, having further discussions on them and in some cases modifying them in detail, became the main advocate in seeing that the new proposals were introduced. Where it was a matter of creating new policy, usually a need for further funds also arose. In these cases it was, therefore, necessary to obtain the approval of Cabinet that the proposals should be introduced as part of the general rehabilitation scheme.

Other proposals were concerned mainly with administration or departmental jurisdiction. At this early stage, questions of policy and major administrative problems were so intermingled that they required to be considered almost as one problem. The matter of

jurisdiction, in particular, required a lot of attention. I have already referred to the arrangements for operating through other departments which existed prior to the creation of the original board itself. Decisions now had to be made on whether those schemes went far enough, and, if not, on what else should be done. Should they continue in the hands of agency departments? If so, how could the board fulfil its complete responsibilities under its Act, unless they could be brought under its supervision? Then, because of the wording of certain Acts, there was doubt whether some functions were the responsibility of the Rehabilitation Board at all, or whether they were the duty of another person or body, for example of the Secretary for War Pensions.

These questions were eventually resolved, but only after numerous discussions. There were discussions between myself as the new Permanent Head and the Permanent Heads of the other departments involved (State Advances, Labour, Lands, Maori Affairs, to quote some), discussions between my Minister and myself, discussions between my Minister and other Ministers. There were also meetings, attended by Ministers and Permanent Heads and, when appropriate, by Treasury, where the best methods for handling a particular problem in the future were thrashed out. Following all this, a submission was prepared for consideration and approval by Cabinet. To assist the Minister in obtaining Cabinet's consent, it was often necessary for the Permanent Head to interview other Ministers at their request, and on occasions to attend Cabinet itself while a matter was under consideration. In the interviews with individual Ministers the range of questions likely to be discussed depended considerably on the outlook of the Minister. One Minister would content himself by asking questions which dealt only with the broadest principles. While one would raise questions of whether the Rehabilitation Board was going far enough and would take the attitude that expense did not matter, another would want to consider the financial implications in the minutest detail. Yet another would never feel entirely happy about a proposal, unless he could be taken and shown on the ground some material thing on which it was proposed to expend money, be it a farm, a building or a business. These last few comments are possibly worthy of consideration. On reflection, you may all agree that in any group of men who are responsible for taking final decisions you will find those who will adopt one of these different mental approaches to the solution of a particular problem.

In the main, the questions raised were solved by adopting one of two methods, namely:

(1) Responsibility for carrying out a particular function and for controlling it was transferred to the new Rehabilitation Department, and was therefore directly under the Permanent Head, who, in turn, was directly responsible to the board. In addition to general policy matters, trade training activities, educational bursaries and farm grading and training facilities, including control of the district farming organization, came into this class.

(2) The actual work was left with an agency department, which was provided with a seat on the reconstituted board; the work of the agency department was thus brought under direction of the board, control being exercised through a committee of board members. The State Advances Corporation, the Lands and Survey Department and the Department of Maori Affairs were the main organizations affected here.

MINISTER AND PERMANENT HEAD IN THE REHABILITATION DEPARTMENT

All these changes were legalized in an amending Act passed at the next session of Parliament in 1944. Both the Minister and the Permanent Head were members of all committees of the board, and while the Minister was seldom able to attend committee meetings, he advised the Permanent Head of any particular case or subject he was interested in. As the Permanent Head (or his deputy) attended all committee meetings, he was able:

(a) To keep the Minister informed of any unusual developments;

(b) To discuss with the Minister decisions on individual cases where questions of principle were involved;

(c) To see that Government and board policy decisions were complied with. The alternative was to ask for these cases to come to the full board for direction. In practice, despite the considerable volume of business, the number of cases brought to the board at the request of an individual member was very low, and those that *were* brought were raised mainly in the early stages of the board's life.

This type of organization enabled the Minister to be kept well informed of what was going on, and, by discussions at monthly meetings, all board members were able to obtain the up-to-date attitude of the Government, the Minister and their colleagues on a subject. The first item on the agenda at each meeting was the monthly report which contained statistical and other information, supplied by committees of the board, and a supplement referring to all important Cabinet decisions, relevant legislation, activities of other associated boards, information on what was happening in other Commonwealth countries, etc. This item provided the opportunity for all board members to introduce for discussion any matter which they wished to raise, if it was not already specially down for discussion later in the agenda. Some of the most valuable exchanges of views arose in this way; frequently they provided the basis for a subsequent submission to the board, either from one of its committees or from the Permanent Head, which resulted in major policy changes. The board followed a deliberate policy of presenting a united front to the Public–Press publicity and comments on policy being confined to the Minister and Permanent Head–and this allowed for most frank discussion on all subjects raised at board meetings.

A further means used for keeping the Minister informed was that the Permanent Head submitted periodical written reviews of progress made and of general problems, whether current or expected to arise in the future. These reports were more numerous in the early years, but continued to be supplied over the whole period. These gave the Minister a background for dealing with questions raised by outside citizens, general questions in the House, as well as talking points in the regular discussions between himself and his Permanent Head. In addition to these means of contact, the joint attendance by the Minister and his Permanent Head at different official meetings, not only in Wellington but also throughout New Zealand, gave opportunities for an exchange of views on a wide range of topics. In my experience, all Ministers welcomed the opportunity to discuss matters of importance with other senior officers as well as with the Permanent Head. This was of benefit also to the officers concerned, as it enabled them to keep more closely in touch with the main objectives of the organization. Except in emergencies, these visits were arranged through the Permanent Head, who was afterwards advised of the trend of the discussions usually both by the Minister and the

officer concerned. In addition, a good system of recording important discussions was maintained by successive Ministers, who sent copies of the record to the department.

The activities of the department were very much a matter of public interest for some years, and consequently it was necessary for the Minister to use every means at his disposal for keeping in touch with what was happening and to find out what was needed from the point of view of the Public. Political meetings, parliamentary debates, meetings of his party organization, meetings with local committees set up by the board and representations from individual ex-servicemen, as well as servicemen's organizations, were a few of the many means which were available, and used, for keeping in touch. The local committees and ex-servicemen's organizations, as well as farming bodies, business and employers' organizations and the like, were also regularly in touch with the Permanent Head.

One further matter may be usefully touched on here. For some years individual representations to the Minister, either personally or in writing, assumed considerable proportions. (At the peak of our activities ministerial letters reached a figure of almost 900 for a week.) These were examined by the Minister's own staff. Those seeking general information were referred for reply by the Permanent Head 'by direction', i.e. the department replied direct to the writer, prefacing the reply with the statement that they were doing so at the direction of the Minister. Others were referred for investigation and the preparation of a draft reply for ministerial signature. Where, from further information supplied by the writer, it was necessary for a case to be reviewed by the appropriate committee, this was done. Where the writer failed to add to the information already known to the committee, it was not usual for a case to be submitted for reconsideration, unless the senior officer supervising the work felt that there was some point which had not been given sufficient weight. Usually a draft reply dealing with the points raised (after approval by the Permanent Head or his deputy) was submitted along with the office file (suitably tagged) to the Minister for signature. I may say here that in no case did I find a Minister prepared to sign 'on the blind'. On the contrary, many of the decisions made by committees, to which I had been a party, formed the subject of Ministerial-Permanent Head discussions, and in some cases were afterwards taken back to a committee for re-examination.

Some other points bear on the Ministerial-Permanent Head relationship, but they can be dealt with later, so I propose to conclude this part of my remarks with a short reference to results. While the Government could overrule the board by giving directions, to my knowledge this happened only three times, and then not on policy matters but on individual cases, during the period of over thirteen years (some of them very active ones) after the board was reconstructed. Both major political parties, the general Public and the returned servicemen's organizations themselves, accepted the fact that the job was adequately and fairly handled; there were seldom any suggestions, even from disappointed clients, that the board (or its committee) was not acting in accordance with Government policy. Where such a suggestion was made, a published policy statement (and these were always issued by the Minister), covering the matter in dispute, could generally be quoted to establish that a correct decision had been made in the circumstances. I would think that the policy decision which was least acceptable to individual members of the Public was the board's ruling which limited the availability of certain forms of assistance to those with specified minimum service qualifications.

In achieving these results, I must emphasize that a very happy relationship had been maintained between successive Ministers and the Permanent Head, between the Minister and the board as a whole and between the Permanent Head and his colleagues on the board. (Incidentally, this was also the atmosphere on another board of which I was a member over the same period.) While there were many arguments, they were based on genuine differences of opinion, and left no traces of bitterness. Politics seldom obtruded into discussions. In fact, on the rare occasions at a board meeting where the course advocated by a member had distinct political implications, a half-humorous query from the Chairman, such as whether Mr A. wanted to see him forfeit his deposit at the next election, was sufficient to turn the discussion in directions in which a more feasible solution could be found.

GENERAL OBSERVATIONS ON THE MINISTER-PERMANENT HEAD RELATIONSHIP

Turning now to general observations, I would suggest that the Ministerial-Permanent Head association is governed by a number of considerations.

First, the constitution of a particular governmental organization considerably influences the relation of a Minister to his Permanent Head and their respective responsibilities. For example, other things being equal:

(a) In an organization where there is a direct Ministerial-Permanent Head responsibility, decisions on policy and the authorization of activities involving expenditure are usually more firmly in the hands of the Minister himself.

(b) Where the Minister is Chairman of a board, of which the Permanent Head is also a member, and the responsibility for deciding a wide range of policy matters is in the hands of the board, there is a greater sharing of responsibility. This often involves the Permanent Head, as well as the Minister, in many public contacts and in a more active part in defending the policy being followed. To-day we find this type of organization has been frequently adopted–examples can be found in the Land Settlement Board, the Board of Maori Affairs and the National Roads Board, as well as in the Rehabilitation Board. The three Armed Services Boards are similarly constituted.

(c) Where a board is independent of close ministerial control, and the Minister concerned is associated only with the broadest policy matters, the relation between the Permanent Head (or General Manager) and the Minister is frequently of minor importance. The association of the Permanent Head in these cases is more with his own board. Such discussions as are necessary on policy matters are usually carried on between the Minister and the board itself.

The more divorced a department becomes from ministerial direction through the creation of independent controlling boards, as in group (c), the greater must be the danger of 'bureaucracy', in the sense that the organization can get out of touch with the Minister and therefore out of touch with the needs of the Public. There is often a slower response in these organizations to a change in Government policy, or even to a change of Government. I am not inviting an argument as to whether or not there is room for bodies of this kind to perform certain functions, for which the Government must take only general responsibility. This is an argument in itself. However, I would observe that there seems always to be a conflict going on between those who see the

dangers of 'bureaucracy', which stem from the creation of such bodies, and those who see as great a danger of political interference through placing the responsibility for certain decisions in the hands of Ministers as members of the political machine. The only point I am interested in here is that where boards are independent of Ministers conditions exist under which bureaucratic rule can flourish. The fact that in many cases the day-to-day proceedings are not published does not create an atmosphere of public confidence in the body's operations–not that publication could be considered in any case, because most dealings concern the private or business affairs of a particular individual, and therefore are not for publication under any system. Probably the best known organizations in this class are the State Advances Corporation and the Reserve Bank. I would not wish to imply, however, that the general remarks I have just made were necessarily directed at these two Corporations.

Second, the extent to which the work of the department is political or contentious usually determines the degree to which it is necessary for the Minister or Permanent Head to work closely and actively together on a day-to-day basis. It has been truly said that the interest taken by the people generally in a particular phase of Government activity will usually decide the things that the Minister will decide himself. I would very much doubt whether the Minister of Customs, for instance, has had of late any decisions to make in that field requiring as much attention as another Minister has had to give to such matters as geothermal power, Cook Strait cables and the associated questions of how to keep the North Island supplied with electricity. These questions fall into the class where, after all the advice possible has been obtained and all expert opinion considered, *the Public expect the Minister to make the final decision.* Reverting to my days in Rehabilitation, I am sure that, despite the demand for land, it would have been politically impracticable to have delegated below ministerial level the authority to acquire compulsorily privately owned lands for the settlement of servicemen.

The essential difference between the positions of Minister and Permanent Head is that while the Minister is elected, and is therefore dependent for his career on the attitude of his electors, the Permanent Head and his staff continue in office in spite of changes in political control. Even although an incoming Minister in a new Government may not be entirely happy with the Permanent Head

he has inherited, there is no machinery for his removal before his service is complete, except on the grounds of inefficiency or unsatisfactory conduct. The job of the Minister is to keep himself informed on the attitude of the Public and the combined views on policy of his colleagues, who, with him, form the Government. He has to decide on the main objectives he must strive for. To him it is the result which matters. While it is accepted that the Permanent Head's part is to advise how best an objective can be achieved, in practice he inevitably finds himself taking an active part in policy formation. In most cases the Permanent Head has had the longer administrative experience, and this is generally useful when advising the best course to follow. It is an accepted practice in this country that Permanent Heads should preserve political neutrality, but this does not mean that it is a good thing to lack political sense. On the contrary, it is necessary that a Permanent Head should appreciate the political implications of any course proposed. He should discuss the best administrative approach, but should suggest others as the next best solutions if, in the light of current Government policy, he has doubts (and expresses them) on whether the first proposal is practicable.

THE USE OF STAFF OFFICERS

To enable satisfactory advice to be given, or the wider implications of proposals to be appreciated, it is necessary in any large and active organization to have a limited number of, in 'Service' parlance, 'Staff Officers', free from day-to-day administration or 'line' duties; after having been tossed a problem, these people can devote their time to delving, researching and thinking about it. While all proposals from this source must be examined coldly afterwards, there is no doubt that much of the effort of such officers can provide the foundation for future action. The best known example of this class of officer is probably the 'Brains Trust' of the depression period, although we have seen many lesser instances since that time. No Permanent Head can possibly hope to set himself up as a walking authority on every subject likely to be encountered, although perhaps some try to do this. The Minister is entitled to efficient service and up-to-date information, and Permanent Heads should rely on their staff for provision of this service.

As against this, there should be a continual guarding against any tendency to allow advice on policy-making to be divorced

from responsibility for its execution. Permanent Heads and other senior officers should not attempt to sell ideas, whether their own or ideas put to them by their staff, before the practical possibilities have been worked out. Anyone who has read Sir Winston Churchill's history of the Second World War will remember that questions of policy and execution and who should be responsible for them provided fruitful material for argument over a long period of the war. There was considerable agitation in Britain for the setting up of a War Cabinet, freed from all other responsibilities except the direction of the war itself. Churchill held the firm view that the bulk of the Ministers comprising the War Cabinet should, in addition, have the day-to-day responsibility for the actual direction of a particular phase of the nation's war effort, arguing that any other system would eventually result in confusion. In the event the Prime Minister had his way, although actual operation orders to Commanders-in-Chief in the field were not issued by the War Cabinet through the particular Minister, but through the Chiefs of Staff Committee which operated under Churchill's personal direction.

THE DUTIES OF PERMANENT HEADS TO MINISTERS

In general, Ministers are prepared to place considerable reliance on Permanent Heads and their immediate subordinates, but there is a responsibility on this latter group to earn that confidence by virtue of their general administrative knowledge and ability, their particular knowledge of their own departments, their independence of thought and, above all, their integrity. The fact that Ministers do rely on their administrative officers does not mean that they necessarily always act on the advice given. On many occasions I can think of they have refused it. Equally, on other occasions some Ministers have tended to accept advice too readily. Sometimes this has been the result of a competent and strong-minded Permanent Head being partnered by a Minister who, because he was new, was not so sure of himself, and, in addition, lacked definite views on the place of his own department in the Government's service to the community.

Too often, however, the tendency not to give approval to proposals in the one case, or to let the department have its head in another, has arisen from a quite different cause. This is the time which Ministers in this country give to personal representations on individual cases. I am afraid that over a number of years

many Ministers have rather encouraged this development. While the follow-up action on many of these, on the assumption that they are typical cases, could be the means of ensuring that the right *general* approach is being made by the department in handling its duties, too often the Minister is too busy to use them in this way; beyond ensuring that these representations have received the consideration that they deserve, he must leave other cases to the department. More important, by becoming immersed in detail, he simply has not the time to sit back and review the work of his department objectively. While this tendency of Ministers might be deplored by critics of management, I have seen no evidence that the man in the street wants his right to approach a Minister fettered in any way. It is probably not fully appreciated that the Permanent Head, too, in the circumstances I have described, is liable to become enmeshed in detail in the same way. His time with the Minister is too often taken up with discussions on individual cases rather than with the main questions relating to the general application of Government policy. In this way the direction of the whole organization can suffer, and in such circumstances 'no rule' can become the general rule.

Nevertheless, by whatever method a decision is reached, and whatever the advice tendered by the Permanent Head, once a decision has been made by the Minister, or where necessary by the Cabinet, it is the duty of the Permanent Head and his officers to carry it out to the best of their ability. It is certainly not their duty to enter into public controversy, or indulge in public criticism because the decision is not entirely to their liking. Nor is it the function of a Permanent Head to enter into public discussions of a policy nature affecting his department, until the Government has decided and publicized the course it will follow. Rather is it the duty of the Permanent Head, when making public statements, to explain how an announced policy will be implemented, to clarify any points of doubt and to give information on what is happening. There have been occasions where these basic rules have been ignored.[3] However, considering the present-day scale of Government's activities and the small number of transgressors, these incidents should be regarded as exceptional; they are not representative of the standards adopted by the great body of public servants

[3] See Peter Campbell, 'Politicians, Public Servants and the People in New Zealand', Part II, *Political Studies* (Oxford), Vol. IV, no. 1 (1956), pp. 20-22.

holding positions of responsibility. In the few cases that I can think of, the officers concerned have been rightly criticized in the Press for exceeding their authority.

I earlier touched on the desirability of senior officers, as well as the Permanent Head, having contact with the Minister, thus enabling him to get the 'feel' of the department, and giving the deputies of the Permanent Head a first-hand chance of appreciating the policy aims of their political head. Nevertheless, the Permanent Head is the *normal* means of communication with the department, and must be kept in the picture. To ensure compliance with Government policy at all levels, it is essential to have machinery to convey information downwards to the individual staff who have to deal with the general Public. This is often done by issuing background information, such as bulletins or newsletters, and not as part of departmental instructions. The general information which has led the department to certain decisions is thus available to officers locally; it enables officers to use their judgment in referring cases for direction when they feel that the circumstances are sufficiently different from the normal pattern to justify this course of action. To my mind this is one matter that needs the greatest possible attention if the Service, as well as being efficient, is to reflect in its handling of the individual case, the real desire and aspirations of the people as interpreted by the Government of the day.

The necessity for the Permanent Head to uphold or support his Minister-for-the-time-being arises in many instances, apart from those that could be inferred from the remarks I have already made. Here are some of them: first, where by virtue of his position the Permanent Head is a member of a board responsible to a major degree for policy decisions, he must be prepared to explain and justify these decisions. This arises particularly where his position brings him into touch with large sections of the interested Public. Where there is no board, and thus there is a 'direct' association between a Minister and a Permanent Head, the latter must still accept responsibility in the numerous contacts that he makes for interpreting, not only the Minister's attitude, but also, as far as he is free to do so, the Minister's reasons for adopting a particular course. Second, as an annual event, Permanent Heads must appear before the Public Accounts Committee

of the House during the examination of the department's annual estimates of expenditure.[4] While it is a rule that questions relating to *policy* are not put to departmental heads by the Public Accounts Committee, in practice this depends to a large extent on the Chairman. Many questions come very close to the borderline, and Permanent Heads must be prepared to give a fair and reasonable account of what is being done. To keep the Minister in the picture it is usual to give him afterwards an outline of what transpired at the Public Accounts Committee's examination, and to draw his attention to any question raised which might lead to later discussion in the House. Third, in the House itself the Permanent Head sits near the Speaker's right and just behind his own Minister, when the latter is handling departmental estimates or piloting legislation through the House. Here he must be on the alert to supply relevant information to enable the Minister to deal with any question raised. Fortunately in New Zealand, perhaps through their close association with the work or perhaps because of the comparative smallness of the country and its population, Ministers, once they have held a portfolio for any time, are usually in a position to deal with many questions themselves. Fourth, with deputations to the Minister from outside organizations, the Permanent Head has the responsibility to supply facts and information on legal, financial and other aspects of a question; but it is clearly the Minister's function *to decide* and advise the deputation on what he proposes to do.

From time to time it is suggested that Ministers are prevented from carrying out what they should do, or what they wish to do, by the power or pressure of their departmental advisers. There is no denying that sometimes a position arises where a Minister is dissuaded from doing what on first examination would seem to be reasonable, but I have yet to come across a case where this has been done improperly. In fact, I can think of a number of instances where I have myself agreed with the Minister that, if we were completely free agents, a particular course of action would be quite proper. More often than not, however, for the protection of the Minister himself against possible allegations of favouritism, graft and the like, advice suggesting a different course of action has to be given. While a particular proposition

[4] Overseas readers will observe that in Britain this function is performed by the Estimates Committee. There is no New Zealand committee which performs the functions of the British Public Accounts Committee.

might, in private business, be regarded as a 'good deal', no one seems to take such a charitable view if a similar decision is made by a government department, unless it has been through one of the various alternatives of tender, quotation, ballot or some other appropriate process. Whenever, therefore, a private businessman has occasion to fret about government restrictions, he may obtain some satisfaction from the fact that the Government imposes equally, and sometimes more, stringent restrictions upon itself.

FINAL COMMENTS

Having given a rough outline of the sort of experience I had as a Permanent Head, the atmosphere in which it was gained and a number of observations based on that experience, I shall conclude by making a few final comments. While the general theory is that Ministers are responsible for policy and Permanent Heads for administration, in practice the division of responsibility is by no means so distinct. In New Zealand many Ministers take a definite interest in the administration of their departments, while Permanent Heads, because of their background knowledge, are invariably drawn into policy discussions, either as the result of their own advocacy or as a consequence of a general Government policy decision. Perhaps one reason why there is not an absolute distinction between the functions of Ministers and Permanent Heads in New Zealand is the country's small population; the division of labour is limited by the extent of the market and by the consequent scale of operations. In addition, as I have observed, the Permanent Head shares responsibility to a greater degree than usual in organizations where he is a member of a board, of which the Minister is Chairman. This concern of Permanent Heads with policy puts them in a quite special position in relation to administrative discretion. The general theme of this Conference is, I understand, how to regulate and control the actions of public servants in *carrying out* Government policy, or in formulating subordinate policies. But, as I have described, *Permanent Heads also have to exercise administrative discretion in giving wise and proper advice to Ministers on policy formulation.*[5] It is fundamental that a Minister, particularly if he is new, should be advised of the *various* approaches that may be made to a problem, not merely the pet one of the adviser. The Government and the Minister are the 'Bosses', and it is the duty of Permanent Heads

[5] See also pp. 131-3, below.

to see that their aims are transmitted to those responsible for implementing them, and that the department gives effect to policy irrespective of personal views.

While there have been cases where these principles have been departed from, the instances that could be quoted are wholly insufficient to support the charge that the Civil Service can no longer be effectively controlled by Ministers and ultimately by Parliament. A senior officer, recently retired, has publicly declared that the Public Service could become a threat to the liberty of every citizen because of its efficiency, coupled apparently with a desire to further its own policies. Leading articles in some newspapers appear to have agreed with this diagnosis. You are entitled to form your own opinions on how correct this view is. Personally I regard it as somewhat fanciful, although it is refreshing to find that one of the biggest crimes of the present day Public Service is apparently its efficiency. By way of contrast, I would like to quote you a passage from Von Mises' book, *Bureaucracy,* in which he quite earnestly said this:

> 'In a properly arranged Civil Service system the promotion to higher ranks depends primarily on seniority. The heads of the bureaux are for the most part old men who know that after a few years they will be retired. Having spent the greater part of their lives in subordinate positions, they have lost vigour and initiative. They shun innovations, and improvements. They look on every project for reform as a disturbance of their quiet. Their rigid conservatism frustrates all endeavours of a Cabinet Minister to adjust the Service to changed conditions. They look down upon the Cabinet Minister as an inexperienced layman. In all countries with a settled bureaucracy people used to say: Cabinets come and go but the bureaux remain.'[6]

It will be seen from this that if you are a senior public servant you just can't win. While one critic says that we are so pushing that Ministers invariably arrive where they did not want to go, the other says that we never start. Both, however, manage to reach the same conclusion, namely that the senior public servant is the villain who frustrates the best of all Government plans.

An eminent German general once made this classification:

'I divide my officers into four classes; the clever, the indus-

[6] (Hodge, 1945), pp. 69-70.

trious, the lazy, and the stupid. Each officer always possesses two of these qualities. Those who are clever and industrious I appoint to the General Staff. Use can, under some circumstances, be made of those who are stupid and lazy. The man who is clever and lazy qualifies for the highest leadership posts. He has the requisite nerve and the mental clarity for difficult decisions. But whoever is stupid and industrious must be got rid of for he is too dangerous.'[7]

It would be an interesting exercise to have the critics I have mentioned select by agreement the particular classification into which they would put senior public servants.

I do not think it would need a researcher skilled in biology, sociology and psychology to establish the fact that public servants, as a whole, are sprung from the same stock as the rest of the community, constitute a fair cross-section of our people, are representative of our education system, and have in fact risen to whatever positions they have attained by their sense of service and the amount of energy, ability, good judgment and integrity they have displayed, rather than through any desire for power or the hope of any great financial reward.

As a final observation, I would suggest that the extent to which a Government's activities are controlled by the elected representatives of the people rests in the hands of that Government itself. Provided that Ministers are always ready to make decisions on matters where there is an active public interest, even to the extent of reviewing where necessary the authority delegated by them or by Parliament itself to subordinate bodies, the essential elements of democracy will be preserved.

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THE DISCUSSION

Mr J. V. T. Baker wanted to know whether a Permanent Head should always make definite recommendations to a Minister; in the lower levels of the Public Service one was generally expected to put a firm proposal up to one's superior. Mr I. D. Dick discussed the problem of how far a public servant should go in advocating a particular course to a Minister. Professor R. S. Milne commented on Mr F. Baker's statement that if a Minister became immersed in detail, the Permanent Head also became immersed; this seemed to disprove any suggestion that, while Ministers were

[7] Quoted in *Public Service* (Wellington), Vol. 5, no. 3 (1956), p. 15.

occupied with details, Permanent Heads were free to seek after power. The speaker thought that sometimes, and particularly where Government policy itself was involved, a Permanent Head should submit, not a precise recommendation, but rather an appreciation, giving the advantages and disadvantages of more than one course of action. He believed that, as far as possible, questions of detail should be dealt with, not only below ministerial level, but also below Permanent Head level.

Mr Innes referred to the Public's fear of bureaucrats; he thought this fear was unjustified, and asked if it could be removed by better public relations. Mr Baker replied that this was part of the general problem departments had in explaining their work to the Public; everyone employed in a department should take part in this, not just those who might be designated 'Public Relations Officers'.

Mr M. O'Connor wanted to know if public servants had ever been passed over for promotion to the highest posts, because their views had been unacceptable to Ministers. Mr Baker answered that during his experience on the Public Service Commission this had not yet happened for any appointment to Permanent Head made under the Public Service Act.

Political Controls

HON. J. R. MARSHALL

The New Zealand Institute of Public Administration has shown a scholarly courage in its selection of the title for the 1957 Convention. Bureaucracy, for the political scientist, is a familiar pattern in large scale administration. For the man in the street it is a term of abuse. Even for the philologist it has a nasty sound. Fowler in his *Modern English Usage* has a note on the word in which he says, 'The formation is so barbarous that all attempt at self respect in pronunciation may perhaps as well be abandoned'. He ends by favouring the pronunciation, 'burŏ′krasi', and the spelling 'burocracy'.

But no amount of abuse can alter the fact that the modern Welfare State, which the people like and want, cannot function without an extensive administrative organization, which the people must tolerate, if not appreciate. This extensive administrative organization is properly called a bureaucracy. It is no new development, either in history or in our own times. In this country its roots go back to the establishment of the colony, and its growth has been persistent and much influenced by the political, social and economic climate of the day.

It is not now a matter of choice between bureaucracy or no bureaucracy. It is a choice between services, which are efficient, economical and subject to adequate safeguards, and organization, which is incompetent, extravagant and intolerant of the rights of the citizen.

I have been invited to speak to you about the political controls of bureaucracy in New Zealand. We do not need to join the popular chorus of condemnation to admit that control of bureau-

cracy is necessary. For this purpose I will refer only to the government or public services, although the actual term, bureaucracy has a wider connotation.

All countries today are democracies. There are dictatorial or 'people's democracies', as they are called behind the Iron Curtain; there are democracies, emerging from feudalism in an awakening Asia; there are democratic oligarchies in the Middle East. If you think that such illustrations involve a contradiction in terms, then you probably belong to the old school which defined democracy as government of the people for the people by the people.

We in New Zealand belong to the old school, although in recent years we have, I think, graduated to the honours class, and qualify as a 'democratic' democracy. We have in this country little social or class distinction. We have an economy which spreads such wealth as we have widely and with more regard to need than to merit. We have an egalitarian society.

It is against that background that we must consider the Public Service and its democratic or political control.

MINISTERIAL RESPONSIBILITY

The Public Service is the *machinery* of Government in this country. It is the means by which the legislation of Parliament, and the policy of the Government, is administered. The Public Service is organized in more than forty departments. In charge of each department is a Minister of the Crown, responsible to Parliament for the conduct of the department.[1] Some English writers go so far as to say that the Minister *is* the department. A ministerial department is a Minister of the Crown to whom powers have been given.[2]

[1] Sir Ivor Jennings, *The Law and the Constitution* (Univ. of London Press, 3rd edn., 1943), p. 184.

[2] D. N. Chester, 'Public Corporations and the Classification of Administrative Bodies', *Political Studies* Vol. 1, no. 1 (1953), pp. 43-44.

However, in New Zealand the Cabinet at present numbers only sixteen. There is therefore an average of two or three departments to each Minister. From a legal point of view, a Minister may therefore 'be' several departments.

For identification purposes a New Zealand department is defined with reference to its Permanent Head: 'a Department, at least in its normal and typical sense, may be defined as a branch of the Government Service separately organized under the control of a Permanent Head who is not himself under any control, except that of a Minister in Charge'–J. L. Robson (Ed.) *New Zealand, The Development of its Laws and Constitution* [Stevens, 1954], p. 88.

It is the Minister who is normally charged, whether by statute or convention, with the carrying out of the powers vested in him.[3] This is generally the legal position, but for practical purposes he is the head of his *department,* and, as such, responsible for its functions. In addition, he is a Member of Cabinet and of Parliament; he is a member both of the executive and legislative branches of Government. That means, not only that he is responsible for his department, but that he is responsible to *Parliament* for his department. Since Members of Parliament are the representatives of the people, the Minister is responsible to the people through Parliament. That is the basis of the doctrine of ministerial responsibility.

As E. N. Gladden has put it in his book, *Civil Service or Bureaucracy?*[4]

> The crux of the whole problem rests within the four walls of Parliament. Here is represented the sovereign power of the people. Even if the centre of gravity has, particularly since the turn of the century, moved inexorably towards the Executive it is still inside Parliament that the final authority lies. It is there that the ministerial administrator can be called to account and it is good that responsibility for administration should be concentrated upon the shoulders of such administrators.

I apprehend that what this Convention wants to know from me is whether the doctrine of ministerial responsibility works in controlling bureaucracy in New Zealand, and, if so, how.

Let me say at once that it *does* work. It depends, however, on system and on personality. Its effectiveness, therefore, varies from Minister to Minister and from Administration to Administration.

THE SOURCES OF POLICY

The Minister is responsible for policy decisions. This means that the decision to change or vary any of the existing functions of a department, or to introduce new functions, must be made by the Minister, or, in important matters, by Cabinet. There are certain policies which are long-standing and unchanging. The policy of the Valuation Department for the valuation of land is an example. In every department there is a continuity of policy laid

[3] S. E. Finer, 'The Individual Responsibility of Ministers', *Public Administration* (London), Vol. XXIV, no. 4 (1956), pp. 376-396.
[4] (Staples), 1956, p. 199.

down by legislation and by ministerial decision, which remains as the working rule in administration until it is changed by amendment or repeal of the law or by subsequent ministerial decision, as the case may be.

When a Minister takes office he inherits a department which is already in being. At the policy level the department continues as before, until instructed otherwise. This realistic process of continuity sometimes leads critics of bureaucracy to allege that the country is being run by the bureaucrats. And so it is–that is what they are paid to do. But they run it according to rules which have been laid down by the responsible Ministers past and present, and according to the day-to-day directions as to their application in particular cases.

Policy changes occur, not from day to day–indeed it would be a poor Administration which frequently changed the rules–but from time to time to meet new situations and changing conditions. The greatest changes come on a change of Government and thereafter at other times of decision, the Budget, on the introduction of legislation and at subsequent elections.

There may be general agreement on the proposition that the Minister or Cabinet makes the policy decisions. There will be less general agreement as to who makes the policy. There will be some suspicious citizens who will again accuse the bureaucrat. Let us see what really happens.

First, each party has certain basic general principles, in the light of which detailed policy is developed. One of the basic principles of the present Government is a belief in private enterprise. This leads to policy decisions in many fields, for instance to the present policy for the encouragement and subsidizing of private hospitals. The 'policy maker' was the party's basic philosophy, not the bureaucrat.

Secondly, we have election policy–the product of the party organization. An illustration is the policy for the sale of state houses. No bureaucrat had anything to do with the *making* of that policy, but its successful administration has been largely due to the enthusiasm, initiative and efficiency of the public servants responsible for its *application.*

Thirdly, we have the 'circumstantial' policy, the policy which grows out of major changes in economic, social or international conditions. In the Korean war, the policy to support the United Nations and to join the Commonwealth Division were policy

decisions, in which the policy maker was the challenge of events and our response to the challenge.

Fourthly, there is in a few cases the people's policy, the product of the referendum as a policy maker. The policy of 6 o'clock closing of licensed premises is an example.

Fifthly, there is the community group as the policy maker. Sometimes it is an interested pressure group, for example the improved policy for Government superannuation advocated by some government servants and adopted by Cabinet. Sometimes policy is made by disinterested groups, for example, the policy of superannuation for the widows of Judges, advocated by the Law Society and adopted by Cabinet.

Sixthly, there is the individual as a policy maker. I suppose Sir Thomas Sidey and his 'summer time' legislation is the most notable instance. There are also economists, political scientists, sociologists and other students of public affairs, who by their individual writings and discussion sow the seeds of political policy.

There are hundreds–no, thousands–of citizens who have ideas for policy and who write to Ministers, call on Ministers, or speak to Ministers at public or private gatherings, or wherever the ear of the Minister can be got. Occasionally an idea so suggested turns out to be both practicable and acceptable.

Seventhly, there is policy making by policy *copying*. The experience of other countries, particularly the United Kingdom and Australia, provides policy proposals often ready-made, particularly in the sphere of legislation. Many proposals for law reform have their origin in Royal Commissions or Committees of Inquiry in the United Kingdom. The English legislation which may follow is frequently adopted with necessary modifications in New Zealand. An example of this is to be found in our Company Law. In 1945 the Cohen Committee reported on the reform of Company Law in England, and in 1948 a new Companies Act was passed. This act was the basis of the New Zealand Companies Act, 1955.

MINISTERIAL ADVISERS

It is apparent that policy making derives its inspiration from many sources. The idea that the bureaucrat spends his time telling the Government what to do, even if it were true, would ignore the fact that Ministers receive advice from many other sources. There is no shortage of unofficial ministerial advisers in all sections of the community. But in the final analysis the Minister has to decide,

often between conflicting claims, and he has to take the responsibility for his decision. That is how it should be, and how it is. The Minister controls policy. I do not, however, suggest that the administrator does not *initiate* policy. He does, and he should. He sees existing policy operating, and knows its strength and its weakness. He is often in the best position to recommend improvements, and a wise Minister will encourage that. I have a great respect for the accumulated experience of Government departments; men who have spent a lifetime in a department have a wealth of knowledge, which, in matters of policy, a Minister can draw upon to the great advantage of the country.

In my experience departments do more policy moulding than policy making. There are few policy decisions made by Ministers or Cabinet that do not involve administration. It is almost invariably the rule to obtain a report from the department, and, if expenditure is involved, from Treasury also, before any decision is made. The careful examination of ministerial proposals made in the light of departmental experience may disclose that the policy can be improved, or that it should be varied or rejected. The Treasury examination will show how much it will cost, and whether there is money in the Vote to pay for it.

It will never be possible to eliminate the personal element from advice, and therefore the personal integrity of the ministerial advisers is no less important than their ability and experience.[5] This is particularly so where expert knowledge is required, as in the Department of Scientific and Industrial Research and the Health Department. It would be possible for an adviser to mislead, but he could not do so honestly or indefinitely. Even in those expert fields, the policy has to stand up, not only to the commonsense standards of the Minister who has to answer for it, but also to the expert scrutiny of the scientist and the professional man outside the Government service.

CONTROL OF ADMINISTRATION

It is sometimes said that the Minister should look after policy, and the department should concern itself with administration. There is an element of truth in this statement; a Minister should

[5] See Mr P. B. Marshall's reference to the public servant's desire to act in the public interest, pp. 115-8, below.

not interfere in the details of administration.[6] I have never examined the accounting system or the filing system of the Justice Department, but I am interested in the results of both. I get the files I want, and I get them expeditiously. The accounting system I am content to leave to the Auditor-General, provided I can find out, as I do each month, how expenditure is running against estimates.

But a Minister is answerable for the administration of his department, and he must therefore exercise a *general* supervision of its functioning.

He exercises this ministerial control in a number of ways:

1. By regular and frequent consultation with the Permanent Head and other senior officers. With large departments this can be an almost daily routine. In smaller departments it is useful to have regular, although less frequent, meetings. When I was Minister in Charge of the Statistics Department I used to see the Government Statistician every Wednesday morning at 9.30. We would discuss for half an hour the work of the Department. He would get decisions when required, and would keep me informed on the result of statistical investigations. He could and did see me at other times as the occasion demanded.
2. By inspection of works, institutions or other projects, which are in the process of being administered.
3. By the scrutiny of the monthly report of expenditure in relation to estimates, and by the obtaining of explanations for any item where there are indications that over-expenditure might result.
4. By a system of regular reporting of decisions made pursuant to delegated authority.
5. By the obtaining of reports on specific matters from time to time and by the annual report on the department as a whole.

MINISTERIAL CONTROL THROUGH ESTABLISHMENTS

It is a common complaint against the Public Service that it is too big and that it is getting bigger. The total number of all

[6] See the Report of the Commission on Native Affairs, *Appendices to the Journals,* House of Representatives, 1934, G. 11, esp. paras. 198 and 264.

government employees is about 129,000 as at 1956, including the Public Service, the Railways, Post and Telegraph Department, Teachers, Police and Armed Forces.[7] It has increased from 118,000 in 1950. This is an increase of 9.5 per cent. During this period the total labour force increased by 11.3 per cent. But the point which must be made is that each Minister had control, not of the appointment of staff, but of the establishment for staff. New positions cannot be created without the approval of the Minister. If the size of the Public Service increases, then it is a matter for which the Minister must take responsibility, and which he can in most cases control.

FINANCIAL CONTROL BY THE MINISTER

It is a common criticism that Government expenditure is too high and should be reduced. It is an equally common criticism, often from the same person, that the Government should provide more money for specific projects dear to the heart of the critic. And the bureaucrat is often blamed, on the one hand for extravagant empire building, and on the other for saying 'no' to projects which are worth while.

Here again the Minister cannot escape responsibility. The allocation of the money available among the departments is the responsibility of the Minister of Finance. Individual Ministers may try to get a greater share, but finally, in the Budget, all Ministers accept collective responsibility.

Within the Estimates, as approved, standing rules permit the Minister to authorize expenditure up to a certain amount and the Permanent Head to authorize it up to a smaller figure. But new expenditure, not covered by the Estimates, must have the approval of the Minister, and where expenditure involves new policy Cabinet approval is required.

MINISTERIAL CONTROL OF LEGISLATION

It is a common charge against bureaucracy that it exercises unjustifiable powers through delegated legislation. This is undoubtedly a danger which must be guarded against. It is admittedly a temptation to seek wide powers by regulation, and then to say that they will be reasonably administered. The present Government provides a check against the abuse of delegated legislation by requiring all regulations to be approved by the Attorney-General

[7] Local authorities employ approximately a further 50,000 persons.

before being submitted to Cabinet. It is one of the time-consuming and often tedious, but important, tasks that I have–to read the draft regulations submitted by the departments through their Ministers and to ensure that the regulations are within the authority of their Statute and are clear, certain and general in their application.

Recently I had to consider a regulation intended to deal with the control of smoke. It read:

> Where any chimney, including the funnel of any ship, but not including the chimney of a private dwelling house, sends out smoke of a density greater than No. 2 of the Ringelmann Scale, it shall be deemed to constitute a nuisance under section 28 (m) of the Act.

Few owners of chimneys would know what the density on the Ringelmann Scale meant, so the regulation was not clear and certain. Also, because a chimney was to be deemed to be a nuisance in certain circumstances, irrespective of whether a nuisance was in fact created, it would have been objectionable on these grounds also. It was not acceptable to say that if no nuisance was created no prosecution would be brought, although this reason was advanced in support of the regulation. After discussions with the Minister and the department concerned the proposed regulation was not proceeded with.

Control of general legislation is provided for through the Cabinet Committee on Legislation, generally known as the Steering Committee, of which the Attorney-General is Chairman, and on which there are Ministers who are lawyers and others who are laymen. They carry out for general legislation the same functions as the Attorney-General carries out for regulations.

I have a specimen of the minutes of a meeting of the Committee held on October 2nd, last year. I will quote three items which give an indication of the way in which the Committee is concerned to see that legislation is drafted in precise terms, that wide powers are not taken, and that the rights of the citizen are protected.

ITEM 2–PUBLIC WORKS AMENDMENT BILL–
L.D.O. 99/1

The Committee *approved* this Bill for submission to Cabinet, subject to the following:

(a) *Clauses 7 and 8*: The Committee *noted* that the effect of

these clauses was to limit the scope of control of aerodromes, particularly private landing strips. The Minister in Charge of Civil Aviation advised the Committee that there were from 7,000 to 8,000 of these private landing strips in New Zealand and it was impossible for his Department to exercise control over them. The operators, however, had to meet certain requirements before they were licensed by the Department. The Minister further advised that no passenger service could operate other than from a licensed field.

(b) *Clause 9*: This clause to be amended to provide that declarations must be made by special order and notice must be given to all persons having any estate or interest in the adjoining lands. This notice must draw attention to the right of objection which is given by the section and to the right of compensation which exists under the Public Works Act 1928.

ITEM 3–FINANCE BILL–L.D.O. 105/P

The Committee *approved* this Bill for submission to Cabinet, but directed that Clause 5 should be given further consideration as the clause as at present drafted was too wide.

The Crown Law Office had given an opinion that this clause was necessary to validate advances made to persons overseas and the Law Draftsman was asked to study this opinion.

ITEM 4–STATUTES AMENDMENT BILL

The Committee gave preliminary consideration to this Bill and in particular to Clauses 9 and 10 of the Bill. The Committee were advised that Clause 10 was designed to prevent foreign controlled operators from obtaining licences to operate drive-in theatres in New Zealand. The Committee considered that the wording of Clause 10 (b) could be more specific and that possibly an appeal authority could be provided for. The Law Draftsman and the Department were asked to take this matter up with the Minister of Internal Affairs.

CONTROL BY APPEAL TO THE MINISTER

It is true that in New Zealand Ministers are as a rule more in touch with the people than in other countries. This is possible because of our comparatively small population. It has been influenced by our historical development from the colonial settle-

ments, through provincial governments, to the pattern of peripatetic administration which continued well into the present century, symbolized by the numerous decisions taken on local railway stations by Seddon when he was Prime Minister. Even today, Ministers with widespread administrative interests, such as Works, Education, Health and Housing, travel extensively for the purpose of seeing on the spot the working out of policy decisions. The accessibility of Ministers is also consistent with our ideas of equality, and I suppose I must admit that Ministers are not unaware of its political advantages, though I think that can be carried too far.

For the purposes of the present discussion the accessibility of Ministers to the Public can be included as a political control on the bureaucracy. It is effective in the control of the abuse of power and in the checking of maladministration. It is *not* very effective in securing the reversal of decisions. An appeal to a Minister is most frequently made by correspondence: a letter which I received last year about the administration of one of the prisons led to a departmental inspection and considerable improvement in certain administrative procedures. However, a letter I received a few weeks ago from a solicitor, complaining about the inadequate treatment of a sick prisoner, showed on investigation that the prisoner had been under competent medical care, and that the doctor's instructions had been strictly complied with. When I was Minister for the State Advances Corporation I received hundreds of letters about housing loans and applications for state houses. It was a most exceptional case which led to any change in a departmental decision. In most cases the full facts were in the possession of the officer concerned, and the policy was well known and understood by him. Sometimes he was more fully informed about the facts than the writer of the letter. To change the decision in favour of a disgruntled applicant would involve a Minister in changing his own policy. That is, of course, the reason why a Minister so seldom reverses a decision made by his department, and why it is so often charged that the bureaucrats dominate the scene. It is, in fact, policy which controls *both* the Minister and the administrator. It is not unknown for a Minister, confronted by a hard case which tempts him to make an exception, to be reminded by an administrator that hard cases not only make bad law but also bad policy.

People whose applications are within the scope of the policy have them granted in branch offices, or at least in head office.

They have no occasion to see the Minister except perhaps to thank him–or, through him, the taxpayer, but it does not often occur to anyone to do that. There are thousands of such decisions made every day. There are, I suppose, hundreds of cases where applications are declined. A few may reach the Minister through the local Member of Parliament, by letter or by personal interview.

The art of giving an adverse decision would be an apt subject for one of the training courses of the Institute of Public Administration. It is the basis of good bureaucratic relations to be able to say 'no' to a member of the Public when the occasion demands, and at the same time satisfy him that you are acting in the public interest.

CONTROL THROUGH PARLIAMENT

The picture of political control of the bureaucracy would not be complete without reference to the scrutiny of Parliament.

A Minister is answerable to Parliament for his department. It is a sobering thought for any Minister to know that inevitably he will have to give an account of himself to the most critical of all audiences–The Representatives of the People in Parliament assembled.

A Minister is answerable in Parliament in nine different ways:[8]

1. Questions, including urgent questions.

Any member may ask a Minister a written question relating to public affairs with which the Minister is officially connected, to proceedings in Parliament, or to any matter of administration for which he is responsible. The Minister gives a written reply which may be debated. Wednesday afternoons during the session are usually devoted to debating answers to questions. The opportunities which this procedure gives to members to obtain information or to criticize administration provide a good illustration of the control of the bureaucracy through Parliament.

2. Motions for Returns.

Members may, by notice of motion, seek information in the form of a return. Returns, papers or correspondence may be laid on the table of the House in this way, if the House agrees.

[8] See also A. H. Nordmeyer, 'A Critical Examination of the Functioning of Parliament', *New Zealand Journal of Public Administration,* Vol. 8, no. 2 (1946), p. 3.

3. Estimates.

The voting of money for the carrying on of the work of each department gives members ample opportunity to obtain information and to criticize in detail the work of the department. The Minister is there to answer for his department.

4. Annual Reports.

Nearly all departments prepare annual reports which are presented to Parliament. The reports are printed and copies made available to members. They then become 'Papers for Consideration'. There are usually several opportunities for debating Papers for Consideration during each Session.

5. The Address in Reply Debate.

In this debate, which comes at the beginning of each Session in reply to the Governor-General's Speech, members may speak for thirty minutes on any subject within the scope of the Standing Orders.

6. The Budget Debate.

In this debate members are free to discuss not only the Budget but any other matter for one hour.

7. Legislation.

Where legislation affecting any particular department is introduced, members have a chance to discuss and criticize the administration within the scope of the Bill.

8. The Imprest Supply Bills.

The Imprest Supply Bills, which are introduced every four weeks until the annual Estimates are approved, also provide members with an opportunity for general discussion.

9. The Special Debates.

The Standing Orders provide that a member may move the adjournment of the House in order to discuss a definite matter of urgent public importance and also provide for the moving of a motion of no confidence.

Through these motions, too, members may examine and criticize administration. On any of these occasions the administration of the Minister's department may be discussed within the extent permitted by the relevant Standing Orders. It is the function of Her Majesty's Opposition to criticize, to inquire, to probe and to scrutinize the

work of Government. The Minister can be well prepared only by being well informed. He must know his department. He cannot be, or at least he cannot remain for very long, the rather bewildered figure, completely at the mercy of the bureaucracy, that some critics suggest he is. When he stands up to speak in Parliament he stands alone, and hopes that he knows just a little bit more than the combined knowledge of the Opposition. But the Opposition can be a fine instrument for the control of bureaucracy. Nor should we forget that the individual Members of Parliament, both Government and Opposition, jealous for the rights of their constituents, can also provide a like control.

I hope I have shown that the dragon of bureaucracy is well chained–that it is not the monster which it is alleged to be, roaming the country seeking whom it may devour. But let us not forget that, if the chains were broken, it could well become a monster. The political controls, together with other factors outside the scope of this paper, ensure today that the bureaucracy is the servant of us all. We must be vigilant to see that it so remains.

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THE DISCUSSION

Mr E. J. Haughey thought that statutes should assist the courts by distinguishing more clearly between judicial and administrative bodies. Mr Marshall said that, although this was desirable theoretically, there were practical difficulties; however, in future statutes the Government would make it clear whether a body would be required to act judicially.

Several people mentioned the danger that Ministers might be over-worked. Mr J. K. Hunn was of the opinion that delegation did not completely solve the problem, because the burden of control over the delegated powers remained. Messrs N. S. Coad, A. W. S. Cook (who had both been private secretaries to a Minister) and Mr R. T. Wright all thought that Ministers might become *too* accessible to the Public. Some individuals might approach a Minister so often that they became a nuisance; a Minister might be left without much time for thinking about future policy.

Mr L. A. Atkinson inquired if Mr Marshall shared the view that Ministers were hampered in long-term policy thinking by the short three-year period between elections. Mr G. R. Milne believed

that if there was more forward planning the Post and Telegraph Department could make better arrangements for ordering new plant.

Mr Marshall did not believe that controlling delegated functions placed a heavy load on a Minister. Delegation should be accompanied by a regular system of reporting back on how the delegated power was being exercised; the quarterly return on prisoners who had been placed on parole was a good example of this. Certainly, Ministers must ration their time and know how to deal with too persistent callers. But personal contacts could be valuable to the Minister; interviews were by no means a complete waste of his time. Besides, it was the New Zealand tradition that the Minister could be approached; this was one of the features which distinguished our system of Government from that of totalitarian countries. In the past three months only ninety-six private individuals or deputations had seen him by appointment, although, because of the nature of their departments' functions, some other Ministers might have seen a larger number. Long-range policy thinking was not being neglected. It was done partly by people outside the Government; the Government itself, by the Ministers within the scope of their responsibility and through Cabinet Committees and associated working parties, was thinking ahead on such topics as general economic policy, the development of industry, hydro-electric power and the future of the Public Service.

Mr R. J. McLachlan was of the opinion that some appeals to tribunals were too costly for the appellants. Mr R. T. Wright affirmed that public servants *did* require to be controlled; even quite junior employees took the attitude that they knew all about the policy of the Government. Mr Marshall agreed that safeguards were needed. Special care should be taken in selecting and training civil servants who dealt with the Public 'over the counter', because the Public often identified these people with 'the Government'.

A Citizen's Point of View

D. J. RIDDIFORD

I am conscious of a great compliment in being invited to address the Institute of Public Administration. I am not a civil servant. I have never been a civil servant, and unless the expansion of Bureaucracy, which is a notable feature of our times, includes even me in its grasp, I am not likely to become one. My paper being written from a Citizen's Point of View, my very deficiencies will give me the advantage of being able to present my views from the standpoint of someone on the outside looking in. The Public outside always has a different point of view from the lion in its cage, or would it be more correct to say that nowadays the Public is in the cage and the lion is outside?

In New Zealand, I at once acknowledge, the Civil Service is held in greater esteem by the average citizen than in most countries of the world, and with good reason. One accepts as a matter of course the honesty of almost every official in the country, which is by no means the rule throughout the world. The standards of efficiency in the departments are reasonably satisfactory, which means that the routine day-to-day work is conscientiously carried out by numerous men and women at all levels. The criticisms I make do not indicate any lack of appreciation of the integrity, the sense of duty, and the honesty of our civil servants; they are directed at faults in the system, from which no system devised by man is wholly free. It is my belief that, if these faults could be eradicated or at least diminished, the qualities of the civil

servants and the qualities of New Zealanders generally would produce better results than at present.

When one comments upon the Civil Service in New Zealand one is commenting upon New Zealand itself, since its ramifications reach and affect every aspect of the nation's life. It seems that there are about 129,000 persons employed by central government departments, in a population of rather over two millions. It would be easy to argue, in view of these numbers, that New Zealand is completely dominated by the Civil Service, and that its citizens' lives are regulated and controlled by an all-powerful bureaucracy from the cradle to the grave. That is not correct. In New Zealand, as in England, the Cabinet, with the support of Parliament, governs the country. The Civil Service carry out the orders of the Government, that is to say the Cabinet, and the Government every three years must face the ordeal of a General Election. The theory of the New Zealand constitution follows closely that of Britain, and Parliament is still the seat of sovereign power which has been delegated to it by the people. Although, broadly speaking, the pattern is similar, Government in New Zealand has developed distinctive peculiarities, and nowhere is that more clearly shown than in the field of public administration.

The growth of the Civil Service has been a marked characteristic of nearly all modern states. To take three leading ones, it is true of America and France as well as Britain. In Britain, however, the growth in the numbers and authority of the Civil Service has gone hand-in-hand with the growth in the power of the Cabinet.[1] The commonplace view is that Parliament is supreme. Some classical writers directed little attention to the position of Cabinet. In fact, however, in Britain when Parliament is elected the party which has gained a majority entrusts to a Cabinet full executive powers. This feature of the English system has been adopted in New Zealand. To carry on the day-to-day work of administration it was important that the Cabinet should have the assistance of an efficient Civil Service. The Executive under the British system is not continuous. Apart from the fact that in Britain its maximum term of office is five years only, when it may be replaced by the Opposition, Ministers are not infrequently changed in the middle of a parliamentary term. Ministers are birds of passage, while the departmental heads are permanent.

[1] L. S. Amery, 'The Nature of British Parliamentary Government' in Lord Campion and Others, *Parliament: A Survey* (Allen and Unwin, 1952).

This feature of the British system, which has been commented on by a number of writers, is even more marked in New Zealand. In the early days of New Zealand it is reasonable to suppose that Ministers took a more active part in the administration of their departments than they do to-day, but already by the 1880's the Civil Service was said to be running the country. Sir John Hall in 1880 told the House it was more important to have a good under-secretary than a good Minister, and Pollen, one of the early Premiers, said that the Government of New Zealand was practically carried on by Civil Servants, and it would function quite steadily if they 'shut up this talking shop for two or three years'.[2] It is a grave error to underestimate the importance of the politician, but it is clear that the Civil Service was playing a vital role in the government of the country by a comparatively early date. This trend became much more marked in Seddon's day. 'King Dick' in opposition criticized officialdom: in office he relied on the Civil Service as a prop of the Administration, and allowed it to expand. Ministers do not wish to be troubled with the day-to-day administration of their departments. If all runs smoothly they are happy to leave the Civil Servants alone and concentrate their minds on matters where the Public are likely to find fault. This tendency is more marked in New Zealand even than in England. General Elections occur every three years instead of, at most, every five. The Ministers in New Zealand enter politics later, and are as a rule less prepared by their early training for administrative duties.

A Parliament consisting of eighty members, seventy-six Europeans and four Maoris, divides itself into a Government and an Opposition. From the Government benches a Cabinet of sixteen, two Whips, a Chairman of Committees and a Speaker are selected. There are twenty office-holders drawn from a party often numbering little more than forty. At least as many members as are in the Cabinet must be keen aspirants for office and therefore unlikely to raise the voice of criticism sufficiently to jeopardize their chances of higher remuneration, more interesting work, and supposedly greater chances of assisting their electorates. If the Executive, as L. S. Amery has said, is powerful in England, in New Zealand it is or could be all-powerful. But is it? To answer that question we must examine the practical limitations which severely restrict the exercise of real power by the Minister.

[2] Leslie Lipson, *The Politics of Equality* (Univ. of Chicago, 1948), p. 163.

The calls on a Minister's time outside his department are never-ending. Besides his work in Parliament itself, where he has to attend night after night, he must always be ready to put himself out for delegations, attend to numerous requests from his electorate and make speeches at ceremonies and functions of every kind. The sheer magnitude of the task renders effective supervision by the Minister of his department extremely difficult. The Civil Service has come to represent the continuity of executive authority and the chief repository of its traditions. It is not only the executive arm of the Cabinet; it also guides the Cabinet in its deliberations.

It needs must follow from what I have said that the power of the Civil Service in New Zealand is very considerable. Like all important groups of human beings, they are criticized, and much of the criticism, as with any large number of human beings, is unjustified. 'I do not know,' said Edmund Burke, 'the method of drawing up an indictment against an whole people.' If one listened only to the careless criticisms made by certain businessmen and farmers one would think Burke, if alive to-day, would have discovered the method of indicting not the whole people of New Zealand but that considerable section of it comprised in its Civil Service. I do not share these views. Frankly, I believe an efficient and honest Civil Service is an essential ingredient in a social democracy such as exists in New Zealand to-day, and that its numbers must be commensurate with the important duties it has to perform. Let us consider briefly some of the general criticisms.

CONSERVATISM AND THE PUBLIC SERVICE

A Civil Service tends to be conservative, both of its good features and its bad. A Civil Service should, up to a point, be conservative. In our system of Government where, as I have explained, the supreme executive power is entrusted to the Cabinet, where Ministers are transient and where power alternates between the 'ins' and the 'outs', the Civil Service represents the continuity of executive authority. The conservative way of doing a thing is usually (but not always) the right way of doing it.

In New Zealand a youth enters the Civil Service as a cadet at school-leaving age, and is from that time conditioned in the ways of his department. He gradually ascends the ladder until, if he has sufficient talent, he reaches the top, having passed through the appropriate grades. Having reached the top, he will in all probability be insisting on the same techniques as he was taught

as a fledgling. I once heard a very senior civil servant speak of the time he joined his department as a cadet before World War I. He remembered how his seniors arrived at ten o'clock in the morning in top hats, and departed at four. They preserved a certain aloofness and hauteur which he claimed had all gone to-day. 'A good thing, too,' he said, 'but in some ways we had to admire the old boys.' The remarks intrigued me because I had often heard horror stories of the way Richard John Seddon packed the Civil Service with temporary staff of little or no qualifications, who were periodically re-appointed and in the end became permanent staff. I understood that the Civil Service had as a result been completely transformed and had lost the decorum which characterized it in earlier days. The story relates to about the year 1913, after Seddon's time, when the Liberals were no longer in power. The top-hatted senior officers must, however, have been relics of the pre-Seddon era, when they had entered the Civil Service. They still, it seemed, preserved an aura of the pre-reform English Civil Service. 'Why,' it was asked in England in the last century, 'are Civil Servants like the fountains in Trafalgar Square?' The familiar answer was, 'Because they play from ten till four.' This perhaps illustrates the conservatism of any Civil Service. It is not difficult to see how conservatism in the sense of blind preservation of *everything* from the past can be a serious fault. It should be realized that the best traditions will never be preserved by blind adherence to form and ceremony. Form and ceremony have their place in the government of men, but they are only one way of preserving all that is best from the past. A more important method is to understand the needs and aspirations of the age in which we live, and in good time carry out the necessary changes, so that the essence of a good tradition can go on. The Civil Service, like most other institutions, needs a periodical overhaul. It has not had one since the Hunt Commission of 1912, which, incidentally, was set up to a large extent because the Civil Service itself requested a thorough investigation. The time may well have arrived when a new investigation should be made.

MINISTERIAL DISCRETION AND THE PUBLIC SERVICE

A frequent subject of criticism is the number of matters where the Minister is empowered to make decisions in cases where no statute lays down in detail what may or may not be done. F. A. Hayek has this to say in *The Road to Serfdom*:

> 'If there is to be economic planning the planning authority must have a discretion. It must provide for the actual needs of people as they arise. . . It must constantly decide questions which cannot be answered by formal principles only, and in making these decisions it must set up distinctions of merit between the needs of different people. When the government has to decide how many pigs are to be reared or how many buses are to be run, which coal mines are to operate or at what prices boots are to be sold, these decisions cannot be deduced from formal principles, or settled for long periods in advance.'

The point is that if there is economic planning the planning authority must have a discretion. Hayek, the author of these telling remarks, argues that it is better, then, to do without economic planning. That, however, may not be possible without giving an unfettered rein to exploitation of the majority by an unprincipled minority. A measure of economic planning is in certain circumstances inevitable, requiring that discretionary powers be vested somewhere.

In New Zealand, ministerial discretion is the accepted method of deciding these ticklish questions. In practice this nearly always means a decision by civil servants. It is, of course, objectionable in itself that a decision which might result in a businessman's financial ruin should be arrived at in this manner. Admitting that economic planning is either necessary or Parliament thinks it is, which from the civil servant's point of view is the same thing, all that can be arrived at is to ensure that such decisions should, so far as possible, conform to the principle that justice should not only be done but should also be seen to be done. Parliament and the Civil Service should unite in furthering that object. Decisions should be given adequate publicity, and full opportunity should be given to appeal against them. This inevitably brings me to the question of the introduction of a system of administrative courts. I believe that if economic planning is to continue, then such courts should be established, but this is a subject beyond the scope of this paper.

CRICHEL DOWN

The famous case of Crichel Down received wide publicity in England, and is of abiding importance because it resulted in a

full-scale public inquiry followed by a report[3] by Sir Andrew Clark, Q.C., which revealed to the Public the inner workings of a Government department and subsidiary bodies functioning, to say the least, at a low level of efficiency. Doubtless departments have in the past muddled along inefficiently, and doubtless they will again. Seldom, however, have the facts come to light as fully as in this case.

The matter concerned 725 acres in the County of Dorset, known as Crichel Down. The personalities were Lieutenant-Commander Marten, a local landowner, who wished to purchase the land and reunite it with the family property of which fifteen years earlier 328 acres had formed part; Mr C. G. Eastwood, Commissioner of Crown Lands (until shortly before a senior official in the Colonial Office), Mr C. H. M. Wilcox, an Under Secretary at the Ministry of Agriculture; Mr Brown, a junior officer in the Ministry of Agriculture; and the Minister of Agriculture, Sir Thomas Dugdale. I will divide my brief summary of the facts into three stages.

(i) In 1937 the Air Ministry acquired the land for use as a bombing range. In 1949 the Air Ministry handed it over to the Ministry of Agriculture. The Ministry took it over because a newly created public body, the Land Commission, which was subject to its general control, wished to develop the land as a model farm. The Air Ministry could acquire land compulsorily for military purposes, but the Ministry of Agriculture had no power to acquire land for the purpose it proposed. One government department could, however, hand over land to another government department; and thus it was done.

(ii) The Land Commission, which had spent a good deal of money in extravagant attempts to create a model farm, decided that it would cost too much to complete the experiment, and the time had come to be rid of the financial and other worries associated with Crichel Down.

Farmers of adjoining land, including Lieutenant-Commander Marten, had periodically tried to purchase the land and had been officially promised a chance to bid for it if it was to be sold or leased. In spite of these promises the Ministry of Agriculture, through Mr Wilcox, an Under Secretary, offered the land to the

[3] Cmd. 9176 of 1954. See also D. N. Chester, 'The Crichel Down Case', *Public Administration* (London), Vol. XXXII, no. 4 (1954), pp. 389-401 and K. J. Scott, 'Ministerial Responsibility for Crichel Down', *New Zealand Journal of Public Administration*, Vol. 17, no. 2 (1955), pp. 1-22.

Commissioner of Crown Lands, which in its turn was to lease it to a farmer living several miles from Crichel Down. Mr Thomson, an estate agent of a private firm employed by the Commission of Crown Lands in the collection of rents, had arranged the lease to the farmer subject to official approval. Mr Wilcox and the Commissioner of Crown Lands, Mr Eastwood, considered that they were under an obligation to stand by Mr Thomson, although it meant dishonouring promises to the farmers of adjoining land.

Before the lease had been completed and while the land was still owned by the Ministry of Agriculture, Lieutenant-Commander Marten succeeded in creating such a furore in the County of Dorset, in the Press and in Parliament that Sir Thomas Dugdale, after holding out for some time, set up a public inquiry by Sir Andrew Clark, Q.C.

(iii) Sir Andrew Clark's report severely castigated those responsible, for muddle, chicanery and deceit.

In the upshot Lieutenant-Commander Marten was allowed to go ahead and purchase the land on which he had set his heart, but subject to the lease. Sir Thomas Dugdale, a popular Minister of Agriculture, resigned, and Mr Wilcox and Mr Eastwood were transferred to other spheres of usefulness.

Among the various lessons which might be drawn from Crichel Down, (which it is said will become part of the folklore of England), these, I think, are relevant to New Zealand:

1. Crichel Down illustrates the dangers which face the Civil Service when it departs from the established activities of the State. The acquisition of Crichel Down by the Land Commission, for development and equipment as a model farm, launched a newly established body into the wide sea of private enterprise, before it had learnt how to swim. The following comment by Sir Andrew Clark is illuminating:

> 'The Land Commission were a comparatively new body, very anxious to gain experience by trying their hand at a new and interesting venture such as equipping Crichel Down as a model farm and, in their eagerness to ensure that they were not deprived of the opportunity, they adopted an irresponsible attitude towards the expenditure of public money and were not always as frank with the Ministry as they might have been.'

2. When the Civil Service is quickly expanded to administer large-scale economic plans, many persons may find themselves in responsible positions without adequate training in the traditions of the Civil Service. Most of the host of officials whose sins of omission rather than deliberate malpractices contributed to the final eruption were persons of little departmental experience. The fact that so many men who had not been very long in the Civil Service were present at every stage to increase the confusion must, I think, be related to the recent expansion, on a considerable scale, of the Ministry of Agriculture. Its staff rose from 2,654 in 1939 to 3,910 in 1946, a fairly moderate increase in view of its wartime efforts in directing food production. In 1947 the total rose to 6,233. In 1948 when the staffs of the County Committees were absorbed by the Ministry the total increased to 17,354. The peak was reached in 1949 with a total of 18,353. Thereafter the number declined.

3. If economic planning carried out by the Civil Service is to continue in New Zealand, as it probably will, the just rights of the individual must be adequately safeguarded. I believe there should be a really satisfactory procedure for appeal against administrative decisions whenever possible. The facts in Crichel Down came out only as a result of a public inquiry conducted on judicial lines. In this case, at any rate, the usual channel for the redress of grievances, which is application to a Minister, would by itself have failed to remedy the wrongs suffered by Lieutenant-Commander Marten and the other farmers. In fact Sir Andrew Clark took occasion to criticize the fierce hostility shown to Lieutenant-Commander Marten by officials of the Ministry of Agriculture, merely because he wished to obtain what he thought were his rights.

PROMOTION IN THE PUBLIC SERVICE

The fact that promotion in the Civil Service is largely by seniority is a frequent ground of criticism. This criticism in its crudest form need not be taken seriously, as the rule of seniority is to a very large extent accepted in any large business. It is the rule in the Armed Services, except where military disasters require the replacement of unsuccessful generals by commanders likely to win battles. Anyone with a knowledge of large-scale organization will appreciate that serious inroads on the general

principle of seniority will quickly undermine morale. The principle of seniority should, however, as in all large organizations, be modified to permit outstanding talent to rise to the top at a reasonably early age.

The method of classification which was recommended by the Hunt Report, and in substance adopted in the Public Service Act 1912, represented a great advance at the time, and in all probability a new Commission, if it were set up, would only recommend certain modifications. In the passage of years certain faults have doubtless crept in. In some departments, maybe, too much weight has come to be given to seniority, but due regard must always be paid to seniority. Ideally speaking, a harmonious compromise between promotion by merit and by seniority should be the aim. The Hunt Report baldly said: 'Merit and merit alone must be the only consideration. Length of service must not be taken into account'. In the course of time, I understand, in spite of the sweeping recommendation of the Hunt Report, the classification of civil servants has come to pay a certain necessary regard to seniority. In any organization good work is more important than microscopic assessments of individual capacity. In all organizations there will be differences in the efficiency of the members, and the older employees, in spite of their experience, will not necessarily be more efficient than the younger. In a good organization, however, the average standard of efficiency will probably be higher than that of the most efficient in a poor organization. The efficiency of an organization is largely dependent on its general morale, a product of many factors, not the least being a due regard to seniority.

The essence of the matter is *due,* but not excessive, regard to seniority. I think that in New Zealand the time has come when the Civil Service should be made sufficiently attractive to induce a limited number of outstanding University graduates to enter at an age when they leave the University. The present system whereby full-time University graduates may, on entering the Civil Service, be given the seniority they would have attained if they had entered at the normal school-leaving age is not sufficient.

GRADUATES AND THE PUBLIC SERVICE

It is a matter of wonder that in our country, where a University education has been made available to almost everyone who wishes to profit by it, little provision is made for top-grade graduates to

enter the Civil Service on a better basis than the cadet at school-leaving age. The existing provisions applying to graduates in accountancy, law, engineering and science do not meet the problem. Such graduates may not be mere technicians, but they obtain preferential posts in the Civil Service only *as* technicians. At present graduates other than such technicians enter the Civil Service only on an equal basis. In my opinion that is a radical fault in the system. In New Zealand to-day there are, leaving out the Post and Telegraph Department, the Railways and labourers (classified under Regulation 130) about 36,000 civil servants. Subject to fluctuating ministerial control, they run the country, and it is surely wrong that no proper provision is made for the direction of their labours to be sufficiently influenced by those who have profited by studying the thought of the great philosophers of the past, by graduates whose minds have been quickened and broadened in an atmosphere which only a University, above all in its Liberal Arts, can provide.

The refusal to admit a few top-grade graduates by offering reasonable inducements has had an unfortunate chain reaction. Excessive emphasis is given to utilitarian studies at the Universities. The arts courses fail to attract the proportion of students that they should, and our Universities are filled with students who grind away to achieve degrees which bring a definite and immediate pecuniary advantage.

My idea is that there should be an administrative division in the Public Service, in which one quarter should be University graduates of the highest calibre.[4] In my opinion there is no need to make special provision for others of medium attainment. These graduates would be set apart from those of merely technical qualifications or lawyers[5] or accountants, who in any case have their niches in the Civil Service. The Public Service Commission and the University should between them settle the syllabus of studies which would qualify for a new Higher Civil Service Examination. Candidates who had attained the required standard in their examinations could then be appointed, if their general character and all-round ability were considered such as to fit them

[4] See H. R. Hulme, 'The Future for Public Administration', *New Zealand Journal of Public Administration*, Vol. 14, no. 1 (1951) and T. R. Smith, 'An Administrative Class for New Zealand?', *New Zealand Journal of Public Administration*, Vol. 14, no. 2 (1952).

[5] A good lawyer is more than a mere technician, but it is purely for his technical skills that he gets a post in the Civil Service.

for high executive positions. Only the best of University graduates would be fit, and then only after adequate practical training, to preside over a department, because those already there are of a pretty high standard. I do not belittle the ability of the heads of departments we have at present. If given the opportunity, many of them would no doubt have satisfied the highest academic requirements. The point I make is that a University course on the right lines enlarges the mind in a special way, and the minds that have been so developed should be employed in the service of the State. All the leading philosophers in all ages would agree with that proposition, and New Zealand will never attain its full stature as a nation until that is recognized.

When I recommend that one quarter only of the administrative division should be highly qualified University graduates, my purpose is to ensure that all the prizes should still be open to those who enter the Public Service in the ordinary way. The number coming in by way of the University would be only a small minority of the total number of civil servants. By no stretch of the imagination could the presence of a few at the top, who have attended the same schools, probably, as the rest but have later achieved distinction at the University, be represented as unjust and oppressive to the majority.

It is not without interest that the Hunt Commission made no recommendation regarding the admission of the highest type of University graduate. The members of the Commission were businessmen, and probably did not feel any great enthusiasm for University graduates anyway. The report says: 'The younger officers should be encouraged to go in for examinations, such as the General Civil Service Examination, law examinations, accountancy examinations, and also such departmental examinations as are considered advisable'. A stiffening of the backbone was, however, considered more important than book-learning. Of equal importance to this rather restricted list of examinations was, in its opinion, 'shorthand writing and typewriting'. Having regard to the present-day shortage of typists, perhaps the Hunt Commission was more far-sighted than it realized.

I venture to think that the Hunt Commission was wrong in not advocating the admission, along carefully considered lines, of top-grade full-time University graduates. In any event times have changed; the Universities in New Zealand have expanded out of all recognition. They could and should today be geared to the needs

of the Civil Service. Where there is no vision the people perish, and it is to the Universities that we must look for the broadening of the minds of at least a proportion of the higher executives in the great departments of State.

A PROBLEM: THE DIRECTION OF THE PUBLIC SERVICE

The government of men has been called the endless adventure, but New Zealanders are apt to regard the whole matter in too casual a manner. In material things New Zealand has accomplished much in its short history, above all in agriculture. In industry the sum of achievement is not to be compared with that of agriculture, yet I can envisage the time when our New Zealand industries, in their own way and subject to the limitations of natural resources and distance from markets, will be second to none in the quality of their products and the economy of their production. In our own time we have seen industry in Australia emerge from a period in which bad labour relations and slovenly methods were a byword, to the present time when Australian industry has attained standards of industrial efficiency to be compared with the leading countries in the world. In New Zealand that time has not yet come, but the fundamental soundness of the New Zealand people indicates that that time should eventually arrive. New Zealand's soldiers, scientists, engineers, and doctors are of world standard, which are sure signs that our country, given the need, is capable of producing leaders as well as the rank and file equal to any demand with which we may be faced.

Apart from the purely pragmatic and materialistic, however, New Zealand falls short. In the matter of Government that deficiency appears to me more striking than in any other field. The Civil Service is clearly bound up with the Government of the country, and if the faults are recognized then the Civil Service can do a great deal to remedy them.

I have already paid a tribute to the honesty, devotion to duty, and integrity of the rank and file of the Civil Service, but the higher direction of the Civil Service does not seem to be adequate to meet the demands of the age in which we live. If I am asked to put my finger on what is wrong, it is not easy.

The primary fault seems to me to lie not so much in the Civil Service but in Parliament. The Civil Service in New Zealand is trained to accept the doctrine of ministerial responsibility. The theory is that policy is laid down by the Minister while the Civil

Service carries it out. If the policy is a failure, or at least is criticized, the Minister must answer for it in Parliament. The tradition is that he will in no event blame the department for anything that may go wrong. This system must often be almost unworkable. Most Ministers are completely unfamiliar with the work of their departments when they first assume office, and not a few remain in that blissful state of ignorance throughout their tenure of power. The Minister, then, cannot lay down policy at the outset, whatever his natural abilities, and in many cases his initial disabilities are not remedied by time. The question is, who *does* lay down policy? The Civil Service, in theory, must not, and the Minister cannot. In fact, unless the department in such a case works out a policy there can be nothing but drift. The system imposes upon the heads of departments the necessity of working out a policy to prevent the whole machinery of Government from running down. In the modern welfare State, to which both political parties are committed, a large Civil Service is necessary. I have deliberately avoided the question of whether our Civil Service is too large for the job it has to do. Most large organizations are. There are, however, well-known means of investigation to determine how many employees are necessary for any given task, and the required adjustments could doubtless be made where it was shown that a necessary job could be as well or even better performed by fewer people. That, however, is not the point; prune how one may, a large Civil Service will still in this day and age be required for the efficient performance of the functions to which the State is committed.

As I have already said, one necessary change is to provide that the ablest University graduates in liberal studies should be encouraged to enter the Civil Service. Sir Charles Trevelyan, one of the joint authors of the famous report on the British Civil Service of 1854, in commenting on that report, said:

> 'It was based throughout upon the positive idea of Government, upon the idea that the Government must be carried on by men who think as to what ought to be done, instead of merely doing that which must be done. The idea frightened some of the ablest of the existing heads of departments.'[6]

Reform in the Civil Service will not of itself achieve the desired result. There must also be reform in the parliamentary direction

[6] Quoted by Felix Frankfurter, *The Public and its Government* (Yale, 1930), p. 141.

of the Civil Service. New Zealand is a democracy. This word may mean many things or nothing, but to most people in New Zealand it means the maximum equality consistent with order. The people demand that the Government should be their very own. They insist on bringing their personal grievances to the personal notice of Ministers, and in fact by the mere physical inroads on the Ministers' time and energy, leave the latter incapable of making policy. It is wrong to think there is adequate criticism of government, either in its parliamentary or its bureaucratic sphere, by the people who pester Ministers. The people who wear out the carpets in the Ministers' ante-rooms are, ninety-nine times out of a hundred, concerned with some purely sectional grievance or personal interest. Criticism of government in Parliament time and again misses the major issues. The attitude of a woefully ill-instructed Public colours the tone of parliamentary debates, which reflect the ignorance of the Public instead of enlightening it. There is a lack of adequate parliamentary leadership, so that whatever the Civil Service may do to direct the functions of government along progressive and far-sighted lines must be done cautiously and largely in secret, which is the negation of what parliamentary democracy should be and could be. The dangerous position which may arise if the Civil Service is not properly controlled was concisely analysed by General Smuts:

> 'The uncontrolled service ceases to be the loyal servant, and becomes parasitical on the country; even governments become its puppets, and in the end it comes to exercise authority for its own ends, and not for the public good. An ideal public service would go far to supply the deficiencies of democratic government, with its vacillation and inexpertness. But in the complicated organism of the state, any organ which becomes independent of the rest becomes a danger, and nothing is so dangerous to the state as a public service which does not march with the people, and becomes a drag on well-ordered progress; it may even have to be dynamited out of its fixed position. Against the growing tendency toward bureaucracy in the public service, only strong governments can protect the people, and democracy does not, under present conditions, tend to produce strong governments. And so the vicious circle continues. Human government can be no better in the end than human nature, and popular self-government will continue to be a difficult machine to work in practice until the political

education of the people has reached a very much higher level.'[7]

I have said where I think the Civil Service is deficient, and, too, I have not hesitated to point to its recognizable virtues. The major fault in the system lies, I think, in the lack of adequate direction, which is two-fold; it rests not only in the Civil Service but also in Parliament.

How this direction can be improved seems to me the central problem in public administration today. It requires vision both in Parliament and in the departments. It requires a proper appreciation of the essential rôle of the Civil Service in its relation to the community in general. The problems should be discussed and clarified so that the people can make up their minds as to what they require from the Civil Service. In our social democracy welfare services are demanded on a scale far beyond what our Victorian forebears thought necessary or desirable, but clearer enlightenment on the whole complex problem should be given than seems at present to emanate from any quarter.

Continuous and systematic thought on public administration in a social democracy would be greatly assisted by an improvement in Parliament itself. The lack for many years of an effective Second Chamber and now the absence of any Second Chamber at all has impoverished parliamentary government in New Zealand, which makes the higher internal direction of the Civil Service far more difficult. The departments receive inadequate direction as to the way they are expected to go, so that they cannot see ahead clearly enough to work out the details and prepare the plans for developments which should be foreseen and provided for.

I believe an effective and useful Second Chamber would greatly increase the authority and prestige of Parliament by directing public attention to the vital questions which require long-term planning. In a calmer atmosphere than the House of Representatives full-scale debates on the welfare State, and where its services should be expanded and where contracted, would enlighten the Public and instruct the Civil Service as to what is required of it.

To talk of parliamentary reform may seem outside the scope of this paper, but it none the less impinges closely on the Civil Service. New Zealand has, by and large, a fine Civil Service; but

[7] Quoted by Frankfurter, *op. cit.*, pp. 158-9.

in the formulation of policy positive improvements could be made. Until they are made the Civil Service will be, in a number of spheres, too often a drag on the nation's energies rather than a stimulus and a help to them.

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THE DISCUSSION

Dr J. L. Robson said that, although ministerial discretion is greater than is generally realized, the danger remains that the public servant with vision may march ahead of the Government and the people. Mr J. Turnbull wondered if the speaker had suggested that the advice Permanent Heads give to Ministers should be made public. Mr Riddiford, in reply, stressed the importance of adequate *discussion,* both in Parliament and between Minister and Permanent Head; however, this second type of discussion must be confidential. Mr R. J. Polaschek commented that Permanent Heads should advise Ministers without previously discussing that advice publicly; it was up to the *Minister* to decide if and when there should be public discussion.

Replying to a question from Mr J. S. Clendon, Mr Riddiford said that there might be occasions when an official could not make a definite recommendation to a Minister. The main thing was that he should not pretend that an issue was free from doubt when it was not.

The speaker agreed with Mr P. J. O'Dea that, although Permanent Heads owed loyalty to the Government in power, they must be careful to avoid involvement in 'political' questions.

Mr I. D. Dick asked if the reason why public corporations, such as the National Airways Corporation, were so seldom accused of being bureaucratic was that their procedures were less rigid than those of the older Government departments. Mr Riddiford thought that their comparative immunity from criticism, if indeed it existed, might result from the skilful way in which they presented themselves to the Public.

To a question from Mr R. T. Wright on the possible composition of a Royal Commission on the Public Service, Mr Riddiford referred to British precedents; he thought that some members of the Commission should be public servants, others should not.

Mr Riddiford shared the view expressed by Mr Templeton that the New Zealand Public Service was not sufficiently highly paid, especially at the top, to attract good University graduates.

Replying to Dr R. M. Williams, he said that his scheme for recruitment from the Universities to the Public Service was not necessarily limited to Liberal Arts graduates, although there had been a strong tendency that way in Britain. However, the study of literature, history, and philosophy not only provided tests of ability, but also equipped graduates for high administrative positions in the Public Service. Other studies might test ability, but did not ground students in knowledge which was most valuable in the government of men. He thought that the syllabus of studies should be settled by the Public Service Commission and the Universities.

The Rights of Citizens

R. B. COOKE

AN EARLIER ADDRESS

Some seventeen years ago a lawyer first addressed this Institute on a subject broadly corresponding to that set down for consideration this morning. That, however, was a notable occasion; for the speaker was one of the dominating figures in the history of the New Zealand Bench and Bar, the Chief Justice of the day, Sir Michael Myers. He called his paper 'The Law and the Administration',[1] and no doubt many of those attending this Convention are familiar with it.

His theme is indicated by the following passage, which was concerned with a clause, certainly somewhat inequitable at first glance, in a contract for the supply of goods from a commercial firm to a Government department, whereby any disputes under the contract were to be settled by the Minister in charge of that department:

> . . . the Minister sat formally to hear the argument, the Solicitor-General attending with his law books, and I [for he was then at the Bar] with mine, from which I likewise wished to cite. The facts themselves were not in doubt; the sole question was one of law. During the Solicitor-General's address to the Minister on this question of law, at his every sentence there was a nod of acquiescence, while when my turn came, I met a stony stare, a derisive smile, or a headshake of negation. The Minister decided the question in favour of the Crown.

[1] *New Zealand Journal of Public Administration,* Vol. 3, no. 2 (1940), p. 38.

> A few years later the Solicitor-General was elevated to the Bench, and by a curious coincidence substantially the same question came before him for decision in the Supreme Court. Again I had the good fortune to be called upon to support the same contention as the Minister had rejected. This time the decision was correct; it was given in favour of the party for whom I appeared.

Myers' presentation of this matter in his paper perhaps illustrates his skill as an advocate, since it is at least questionable whether a contractual provision of the type to which he refers would have the effect either of empowering the Minister conclusively to determine a pure question of law or of excluding the ordinary jurisdiction of the courts to do so.[2] But the passage epitomizes the main features of the address: the Supreme Court, he suggested, was the one institution left to safeguard the liberty of the subject and the rights of the individual, yet its jurisdiction was being gradually encroached upon and the amplitude of its protective power diminished.

In addition to the contract case already mentioned, he gave a series of other illustrations of what he described as 'actual attempts in New Zealand to oust the jurisdiction of the Supreme Court'. Almost all these illustrations consisted simply of provisions in Acts of Parliament conferring discretionary authority on Ministers of the Crown or other officers to make regulations, orders or decisions. He cited seven cases in which such provisions had come before the courts for interpretation, as the result of claims that the administrative authorities concerned had exceeded the bounds of their lawful discretion. In each of these cases, however, it happened that the court had upheld the submissions of the subject and decided against the administrator. Nor did he give any illustration of a judicial decision in which the court had in fact held that its jurisdiction to protect the subject had been effectively ousted.

It is not surprising, therefore, that Chief Justice Myers' address contained no hint of any want of confidence in the ability of the ordinary courts to master new problems in the expanding field of administrative law, problems which stem in the main from the inevitability of administrative discretion. Certainly he professed not to be sure of the meaning of the term administrative law; but he went on to give a characteristically lucid explanation of it; and

[2] See *Baker* v. *Jones* [1954] 1 W.L.R. 1005; *F. R. Absalom Ltd.* v. *Great Western (London) Garden Village Society* [1933] A.C. 592.

the basic impression left by his words is that he entertained no doubt that in the modern State his court could continue effectively to protect the rights of citizens, provided only–although the proviso was rather vague–that the jurisdiction of the court was left intact.

SOME LEADING CASES, 1929-1946

Justification for that confidence was not lacking. In the years when Sir Michael Myers was Chief Justice, the New Zealand courts could lay claim to substantial achievements in administrative law. This is not the occasion for anything approaching a full review of the relevant judicial decisions of that period, but no apology should be needed for mentioning a few of the leading cases: too much discussion of this branch of law takes place at the level of generalization and theory, and not enough in terms of practical problems and specific facts. At the outset it should be mentioned that this paper is necessarily less concerned than the others delivered at the Convention with the distinctions within the administration between the functions of the Minister and the functions of those who advise him or implement his decisions. Many of the powers in the exercise of which officials play a part are legally vested in Ministers; and the courts are commonly concerned with the product rather than with the working of the administrative machine.

If any common quality can be said to be especially noticeable in the cases of the period now to be considered, it is perhaps the readiness of the judges to search for the spirit of legislation rather than to adhere to a rigidly literal technique of interpretation; to look to the substance and effect of transactions and administrative decisions, rather than to their outward or verbal form. This tendency runs through the trilogy of cases which did so much to settle and expound the principles which the New Zealand courts apply in determining whether a statutory discretion to make regulations has been validly exercised. In the first of the three, *Kerridge* v. *Girling-Butcher*,[3] there arose for interpretation apparently sweeping language in the Board of Trade Act, empowering the Governor-General in Council to make by regulations such provisions as he deemed necessary in the public interest, not only for certain speci-

[3] [1933] N.Z.L.R. 646. The other two decisions were *Carroll* v. *Attorney-General* [1933] N.Z.L.R. 1461 and *F. E. Jackson & Co. Ltd.* v. *Collector of Customs* [1939] N.Z.L.R. 682.

fied purposes, but also 'for the regulation and control of industries in any other manner whatever which is deemed necessary for the maintenance and prosperity of those industries and the economic welfare of New Zealand'. Nevertheless a majority of the Court of Appeal were able to hold that these words did not authorize certain regulations relating to the film industry. These purported to prevent the issue of new licences for exhibiting motion pictures in situations where that would cause undue hardship to established exhibitors. Each member of the majority gave different reasons for holding the regulations invalid; but underlying each judgment seems to be the consideration that it would be unsafe to deduce from a statute drafted in terms so general that Parliament intended to confer upon a Minister such a drastic power as that of prohibiting a duly qualified newcomer from embarking upon competition in his chosen trade, business or profession.[4]

The emphasis on substance rather than form is also evident in two important decisions of Myers C.J. himself, relating to statutory discretions conferred on public bodies. In *Palmerston North City Corporation* v. *Manawatu-Oroua Electric Power Board*,[5] the board had reduced some of its charges for supplying electricity to country consumers and had resolved to recoup the consequent deficiency in its revenue by levying a rate on property in the city, which was part of its district. If regard were had only to the bare words of the relevant Act and resolution, the board was acting within its powers. The Chief Justice found, however, that the real purpose of the board was to implement a policy to which the majority of its members had pledged themselves before they were elected to office, namely to put an end to a contract between the board and the city corporation under which city consumers paid less for their electricity than country consumers. He held that he 'could not impute' an intention to the legislature to authorize the board to use its powers for such a purpose; and in so holding he invoked a principle enunciated in the House of Lords by Lord Macnaghten in 1905,[6] that a public body invested with statutory powers of the type in question must not only keep within the limits

[4] Cf. *Hanna* v. *Auckland City Corporation* [1945] N.Z.L.R. 622. (Building by-law discriminating between architects lawfully carrying on their profession held *ultra vires* 'in the true sense' and also, per Myers C. J. and Kennedy J., invalid for unreasonableness.)

[5] [1934] N.Z.L.R. 1100.

[6] *Westminster Corporation* v. *London and North Western Railway Co.* [1905] A.C. 426, 430.

of the statutory authority committed to it: it must act in good faith and it must act reasonably.[7]

The cases that have been mentioned will suffice to show that, in performing their function of ascertaining the limits of statutory discretion, the courts of that period did not hesitate to control administrative authorities with a firm hand. Perhaps it was sometimes too firm; although, to do justice to Myers C.J. himself, it is right to record that he applied his precept of judging discretionary acts according to their substance rather than their form in favour of administrative authorities as well as against them. His judgment in *Jensen* v. *Wellington Woollen Manufacturing Co. Ltd.*[8] provides an example. There the majority of the Court of Appeal held that a ministerial order as to wages was invalid because it was expressed to be made 'in order to facilitate the effective conduct of emergency operations arising out of the war'; whereas the Minister's discretion to make such orders arose if it appeared to him 'necessary or expedient so to do for the efficient prosecution of the war or for maintaining essential supplies and services'. The majority thought that the Minister had addressed his mind to a wrong test; the Chief Justice, who (with Kennedy J.) dissented, was prepared to overlook the inartistic draftsmanship and to hold that the words appearing in the order were merely a paraphrase of those prescribing the conditions in which the Minister's power arose.

Further evidence that the Chief Justice was no inveterate opponent of administrative discretion is afforded by his decision on the discretion of the police in *Burton* v. *Power*.[9] He held that a speaker may be compelled to desist from addressing a meeting, although his speech and motives may have been perfectly lawful, if a police officer reasonably apprehends that a breach of the peace would ensue if the meeting continued. Some would argue that this decision conceded too readily that the citizen's right of freedom of speech is commensurate only with the extent to which his opponents are willing to refrain from unruly behaviour. Such an argument would turn on the possibility that the English case of

[7] The same principle was again applied by Myers C. J. in *Attorney-General* v. *Levin Borough* [1945] N.Z.L.R. 279. An appeal against this decision failed, [1947] G.L.R. 300, but on grounds which made it unnecessary for the Court of Appeal to examine Lord Macnaghten's principle.

[8] [1942] N.Z.L.R. 394.

[9] [1940] N.Z.L.R. 270. See also *The King* v. *Burton* [1941] N.Z.L.R. 519, 530.

Duncan v. *Jones*,[10] on which the New Zealand decision was founded, may be authority only for a situation in which the speaker himself would be guilty of 'causing' the contemplated breach of the peace,[11] as by giving vent to unnecessarily provocative language.

CONTROL OF TRIBUNALS

Another major branch of administrative law is that concerned with the supervisory control exercised by the Supreme Court over other tribunals. Here the case law of the Myers period is less rich in contributions, but there were some decisions of considerable interest. The importance of those elementary principles of procedure, known as the rules of natural justice, was stressed by *Boyes* v. *Carlyon*[12] and *Duncan* v. *Graham*,[13] both cases in which decisions of tribunals were quashed because they had been reached without giving the party prejudicially affected an adequate hearing. In the former case a Public Service Commissioner had held an inquiry in circumstances which denied to the officer concerned the opportunity of exercising a statutory right to be represented by counsel; in the latter a magistrate had convicted a defendant of an offence different from that with which he was formally charged without making it absolutely clear that he was being called upon to answer a substituted charge. Where a citizen is entitled to a hearing before being adversely affected by a decision, the question what form of hearing is adequate is one of difficulty. The answer probably varies according to the nature of the decision involved. The problem can be particularly acute when an administrative tribunal has before it several parties with conflicting interests, who are not anxious to disclose information to one another. The principles of law to be applied in such situations are still in the embryo stage.

The other main aspect of natural justice is the rule against predetermination, bias or interest on the part of a tribunal. As to that, the *Timberlands* case[14] of 1934 could give rise to problems in the future. The actual decision of the Full Court was that the Court could not prohibit a Commission of Inquiry from acting, even if its members were biased or financially interested in the

[10] [1936] 1 K.B. 218.
[11] See D. L. Keir and F. H. Lawson, *Cases in Constitutional Law* (Clarendon Press, 4th edn.), pp. 400–404.
[12] [1939] N.Z.L.R. 504.
[13] [1941] N.Z.L.R. 535.
[14] *Timberlands Woodpulp Ltd.* v. *Attorney-General* [1934] N.Z.L.R. 270.

subject-matter of the inquiry, unless, having regard to the particular subject-matter, there were parties who were liable to be cited to appear before the Commission and who were therefore in peril of having costs awarded against them. The Commission in that case was not of this type, so that the Court had no control over it and did not need to investigate the complaint that two of its members were disqualified by bias or interest. But the decision has unexplored potentialities if it is intended to suggest that, in the case of a Commission having power to award costs, the Court can entertain such a complaint, notwithstanding that the members have been appointed *ad hoc* by the Governor-General in Council.

As well as ensuring that other tribunals follow natural justice in their procedure, the Supreme Court must, if application is made to it, see that they keep within the limits of their jurisdiction so far as the substance of their decisions is concerned. Here the crucial question is what affects jurisdiction and what does not. The courts of this period were no more successful in answering it than courts and writers usually are. It is the vexing problem of working out viable principles to distinguish between, on the one hand, a preliminary or collateral question upon which the decision of a tribunal of limited jurisdiction is not conclusive, and, on the other, a question which falls within the jurisdiction of the limited tribunal, so that its decision thereon is conclusive unless a statutory right of appeal has been conferred. Compare, for instance, the cases of *Canadian Knight & Whippet Motor Co.* v. *Frazer*[15] and *Bethune* v. *Bydder*.[16] Why is it that a decision of the Compensation Court that a man is a 'worker' within the meaning of the workers' compensation legislation cannot be successfully challenged for excess of jurisdiction, no matter how wrong the Supreme Court may think the decision, while a decision of a Magistrate's Court that a building is a 'dwellinghouse' within the meaning of the tenancy legislation can be so challenged and set aside in the appropriate prerogative writ proceedings? In the present state of case law and legal research it is difficult to find a rationale of such differences.

The prerogative writs are a means whereby Her Majesty's Supreme Court carries out its task of confining the activities of other authorities in the land to their lawful extent and enforcing their public duties. Habeas corpus serves to test the legality of

[15] [1932] N.Z.L.R. 1295.

[16] [1938] N.Z.L.R. 1. See also *Sykes* v. *Atkin* [1942] N.Z.L.R. 63; *Ryan* v. *Evans* [1946] N.Z.L.R. 75.

imprisonment, mandamus to command the performance of a duty, prohibition to restrain future acts in excess of jurisdiction, certiorari to quash a decision already reached. The last two writs are available only against persons or bodies who come within the twofold but elastic test formulated in England by Atkin L.J. in 1923[17]: they must have legal authority to determine questions affecting the rights of subjects and they must have the duty to act judicially. In New Zealand, later in the same year, Salmond J. said that he was aware of no reason, in principle or authority, for drawing any distinction between prohibition and certiorari in respect of the courts to which they would go.[18] Relying upon his high authority, the ordinary courts in the period now being considered at least twice granted certiorari to quash orders or awards made by the Court of Arbitration;[19] for the Judges disagreed with the view taken by the Court of Arbitration as to the meaning of 'industrial matters' and 'industry' in the Industrial Conciliation and Arbitration Act, and held that the Court had sought to regulate matters beyond its jurisdiction.

It is possible, however, that Salmond J. broke fresh ground in denying the existence of such a distinction between the two writs. Prohibition lies to any tribunal of limited jurisdiction, even if it be entitled to the designation Superior Court.[20] Hence there can be no doubt that the Arbitration Court is rightly subject to this writ. But, at any rate in 1923, the authorities were by no means clear upon whether certiorari lay to any tribunal of limited jurisdiction, however high its standing. In the light of the status conferred by Parliament on the Judge of the Arbitration Court[21] and the wide

[17] *Rex* v. *Electricity Commissioners* [1924] 1 K.B. 171, 205.

[18] *N.Z. Waterside Workers' Federation* v. *Frazer* [1924] N.Z.L.R. 689, 709. Both this case and the *Electricity Commissioners'* case were decisions extending the concept of acts that are 'judicial' in the sense that prohibition and certiorari will lie. It is interesting to note that the English and New Zealand courts came independently to the conclusion that the conditions of the modern State required a wide scope to be given to these writs; for presumably no report of the English case would have reached New Zealand by the date when the judgments in the *Waterside Workers'* case were delivered.

[19] *Butt* v. *Fraser* [1929] N.Z.L.R. 636; *In re Otago Clerical Workers' Award* [1937] N.Z.L.R. 578.

[20] *James* v. *South Western Railway Co.* (1872) L.R. 7 Ex. 287; *Rex* v. *Chancellor of St. Edmundsbury and Ipswich Diocese* [1948] 1 K.B. 195, 208.

[21] Industrial Conciliation and Arbitration Act, 1954, ss. 18 and 19, replacing I.C. & A. Act, 1925, s. 64.

terms in which the powers of the Court are defined,[22] it might be arguable that such a court does not possess an 'inferiority' of status appropriate to render it amenable to certiorari. But the point must now be regarded as settled in New Zealand.[23] In any event, it may not be of great practical importance, especially at the present day, when the tendency of the Supreme Court is increasingly to treat the Arbitration Court almost as an equal partner in the administration of justice.[24]

The case law on tribunals in this period should not be left without referring to one last decision. It is the striking judgment of Callan J. in *Keenan* v. *Auckland Harbour Board*.[25] A judge or magistrate who presides over an ordinary court has absolute privilege as regards defamation. Even an allegation that in the course of his judicial work he has maliciously slandered a person will not entitle that person to sue him for damages. Such is the importance, in the eyes of the law, of ensuring that those who administer justice will be undeterred by fear of being subjected to harassing and vexatious actions by disappointed litigants. The same protection applies to witnesses and counsel. In general the courts have been chary of extending this complete immunity to the proceedings of other tribunals. Speaking very broadly, it is probably true to say that a body which is bound to act judicially in its procedure, in the sense that it must grant a hearing, but which is entitled to pursue an administrative policy in its decisions, has only qualified privilege. That is to say, if its members defame a person maliciously they are liable in damages. But, in *Keenan's* case, Callan J. held that a District Manpower Officer, in deciding whether to consent under Emergency Regulations to the termination of a worker's employment on the ground of alleged misconduct, was performing a task so nearly resembling that of a law court that the employer's letter seeking that consent was absolutely privileged. It was of dominant and decisive importance, the Judge held, that a master who had just cause for asking leave to dispense with his servant should not hesitate to do so through fear of actions for damages. Accordingly, even a claim that the master had

[22] *Ibid.*, s. 36 (1954 Act); s. 80 (1925 Act).

[23] The law of England appears to be developing in the same direction: *Regina* v. *Medical Appeal Tribunal* [1957] 1 W.L.R. 248.

[24] See e.g. *Wellington Municipal Officers Association* v. *Wellington City Corporation* [1951] N.Z.L.R. 786.

[25] [1946] N.Z.L.R. 96. An attempt to appeal from this judgment failed because it was out of time: [1947] N.Z.L.R. 185.

written of the servant's conduct in bad faith could not be investigated by the court.[26]

So much for the administrative law of the Myers era. To call the period that is not to ignore the many contributions of other eminent Judges, but the description is natural not merely because Sir Michael Myers was then Chief Justice. Although the cases mentioned have been collected without regard to the personnel of the court, a check discloses that of the nineteen decisions cited the Chief Justice delivered the sole judgment or one of the judgments in seventeen. This seems to suggest that, in his opinion, the part of constitutional law which, for convenience, is now usually called administrative law was apt to raise legal issues of first importance.

No one would contend, of course, that the judicial work of the period in this field was flawless. The public servant might feel that some of the judgments showed a lack of sympathy with administrative objects or a lack of understanding of administrative difficulties; the subject might feel that some unjustly subordinated private rights to public interest or administrative convenience; the commentator might feel that some exhibited powerful advocacy rather more than scrupulous judicial consideration. But a measure of criticism of this sort is inevitable in a controversial field. By and large it can surely be said that the courts of that period left a solid body of achievement in administrative law.

A CHANGE IN THE CLIMATE OF OPINION

'Look here upon this picture, and on this.' In the post-war decade the complexion of administrative law in England and New Zealand has undergone changes. Before the war those interested in the field tended to fall into two groups. At one extreme were lawyers such as Lord Hewart, a Lord Chief Justice of England and a former Attorney-General, whose views were quoted extensively by Chief Justice Myers in his address. Hewart represented a school of thought disposed to see administrators as men with despotic longings in them, bent on nullifying the power of the courts to act as an effective constitutional check and balance thwarting their designs. At the other extreme were those who regarded the courts as obscurantist institutions, manned by Judges

[26] Is this an instance of a hard case making bad law? The jury had found that the employer's accusation was malicious, but Callan J. said that he would have decided otherwise: [1946] N.Z.L.R. at 103.

whose background and training inhibited sympathy with enlightened aims and who frustrated collectivist legislation by imposing a strict and grudging interpretation on the powers it conferred.

Some members of the second school of thought have long argued –although it is noteworthy that here Professor Laski did not join with them[27]–that the ordinary courts lack 'the freshness of view, the capacity to invent new rules, doctrines and standards, the readiness to abandon outworn legal tools which fail to serve modern needs, which are required in a superior administrative appeal tribunal to make judicial review of executive action a reality, and judicial scrutiny of administrative justice effective'. The words are those of Professor W. A. Robson.[28] Hence it is contended that a special administrative court of appeal, independent of the ordinary courts, should be established, and that, in addition to such new authority over administrators as may be vested in it, there should be transferred to it all or a large part of the existing jurisdiction of the ordinary courts in administrative law.[29] So far as is known, the task of drafting a Bill embodying such a proposal still awaits performance, so that some points remain vague.[30] But the general effect of the proposal is clear enough. Expressed in New Zealand terms it means that the Judges of the Supreme Court would be left to deal with disputes between private individuals and with the criminal law. For instance, they would retain that large proportion of their present work which consists of modifying wills, granting divorces, presiding over jury trials concerning highway or factory accidents, and hearing appeals against sentences imposed by magistrates. But disputes turning on the ascertainment of the boundaries between the liberty of citizens and the discretionary authority of administrators would apparently be assigned to a body better qualified and more willing, so runs the argument, to grapple with these major justiciable problems of the twentieth century.

In 1932 the Lord Chancellor's Committee on Ministers' Powers advised unhesitatingly against the adoption of Professor Robson's proposals. The Committee thought them 'inconsistent with the

[27] See the Note added by him to the Report of the *Committee on Ministers' Powers* (Cmd. 4060, 1932), pp. 135-7.

[28] *Justice and Administrative Law,* (Stevens, 3rd edn., 1951), pp. 544-5.

[29] *Ibid.,* pp. 618-20.

[30] Cf. Professor Aikman's comment on the defined objects of the Constitutional Society in his survey, 'Some Developments in Administrative Law', *New Zealand Journal of Public Administration,* Vol. 19, no. 2 (1957), p. 55.

sovereignty of Parliament and the supremacy of the Law'. At first sight this language may seem puzzling, for clearly such proposals could be implemented only by legislation, and that legislation would be subject to interpretation by the ordinary courts of law in cases of doubt. What the Committee meant was that on questions of policy Ministers of the Crown should remain responsible to Parliament and public opinion, rather than to a supreme administrative tribunal, and that, equally, no part of the jurisdiction of the ordinary courts to decide questions of law should be surrendered to any such tribunal. The Committee was a widely representative body, and until recent years there has probably been no wide support for proposals of the kind which it rejected.

But, in recent years, the picture has greatly changed. It is now from the ranks of those who are on the right in politics, or who are most devoted to the spirit and institutions of the common law and the values for which it stands, that suggestions are put forward for radical reform of the foundations of administrative law. Such a scholar of the common law as Professor C. J. Hamson, learned also in the law of France, is filled with admiration at the achievements in administrative law of the French Conseil d'Etat, but plainly bitterly disappointed with some of the work of the English courts:

> For my part I experience a sense of dismay when I turn from the Conseil d'Etat to look for an equivalent English court . . . What most dismays me is my sense that when the English courts today come to cope with a minister exercising discretionary authority given to him by Parliament, instead of showing that authority and sureness of touch and determination to deal with the substance of the matter–which they have from time to time elsewhere shown and which with a no doubt foolish degree of romanticism we rather expect them to show–they exhibit a degree of deference and obsequiousness which is to me repulsive. What thought you Mr Junior of the recent case of *Ellis* v. *Home Office* [1953] 2 Q.B. 135 where, you will remember, the Court of Appeal eventually allowed the defendant to claim State privilege for a document which the Court (and everybody else) perfectly well knew, as a matter of fact though not from evidence before them, in no way touched the public safety of the State? It is no doubt unpleasing that the manoeuvre should be permitted of using a privilege established for the protection of State interests to secure

> the immunity of a department from an action in tort–it certainly is to me unpleasing that an English court should be less effective than a Scottish one–but I found infinitely more unpleasing, as an exhibition of impotence, the petulance of the Court of Appeal simply blowing off steam (if I may use the expressive and inelegant phrase of a member of this Society).[31]

Forcibly though this view is expressed, it would be wrong to dismiss it as idiosyncratic or uninfluential. Many lawyers, politicians and students of politics have come to think on similar lines. The issue of a supreme administrative tribunal or not is now more live than it has ever been. Indeed it was suggested that it might form the main topic of this paper. Clearly one must ask why this dissatisfaction with the ordinary courts has sprung up, and whether it is justified.

A CHANGE OF EMPHASIS IN THE CASES

That dissatisfaction may be ultimately attributable to the war. Our administrative law is surprisingly flexible. Like the rest of constitutional law it seems to become more and more, in the words of Maitland's famous aphorism, an appendix to the law of statutory interpretation. (Many practitioners would regard this as true now of nearly all law. Perhaps ninety per cent. of the questions of law which are encountered at the bar turn on the construction of statutes.) The sort of problem with which administrative law is typically concerned arises when an exercise of a statutory discretion conflicts with private interests and the particular state of facts is not one which the parliamentary draftsman has envisaged or unambiguously provided for. The function of the courts is merely to interpret the Act; but in such a situation they may have to eke out the general words of the Act with the help of presumptions or canons of construction. These presumptions or canons often conflict, so that it is possible to select whichever is conducive to a result that seems desirable for other reasons, and thus to justify that result by a show of legal logic. If a broad construction seems desirable, reference can be made to the duty of the court to give a statute a fair, large and liberal interpretation, and not to read into it limitations which the legislature has not expressed. Similarly,

[31] An address delivered in Gray's Inn Hall and printed in *Graya,* Michaelmas Term, 1956, p. 86; reprinted in 35 *Canadian Bar Review,* 150. Professor Hamson's Hamlyn Lectures, *Executive Discretion and Judicial Control* (Stevens, 1954), are probably the best introduction in English to the judicial work of the French Conseil d'Etat.

a narrow construction can be supported by invoking the principle that an intention to interfere with common law rights should not be attributed to Parliament unless the clearest of language has been employed.

Not uncommonly, therefore, the process of interpretation has a constructive aspect; and in their approach to the task the courts are naturally influenced by the values currently ascendant in the community. 'It is my private opinion', wrote Pollock to Holmes in another passage which has become almost trite as a quotation, 'that in time of war there is no such thing as the liberty of the subject'. In judicial language a somewhat similar idea was expressed by Smith J. in a New Zealand wartime case:[32]

> It is true that the fundamental liberties of the subject are secured in the common law of England on the principle that the subject may do or say as he pleases, provided he does not transgress the substantive law, while, on the other hand, public authorities, including the Crown, may do only what they are authorized to do by some rule of law or statute . . . But the same law also recognizes that the Legislature is supreme and that the Legislature can, and in an emergency does, modify and suspend what are sometimes called the fundamental rights of the individual. When the interpretation of legislation of this kind comes before the Court, the function of the Court is simply to inquire whether the Legislature has used adequate language to achieve its object. In determining this question, the Court will give due weight to the paramount fact that the object of the legislation is the preservation of the State which confers these fundamental rights.

So it is that the overriding demands of total war were reflected in the English law reports by a line of decisions in which the courts conceded to the executive discretionary powers of the greatest amplitude. The best known of these decisions–their zenith or nadir, according to your point of view–is *Liversidge* v. *Anderson*.[33] The highest court in England, the House of Lords, there held that where the Home Secretary, acting in good faith under an emergency regulation, made an order in which he recited that he had reasonable cause to believe a person to be of hostile associations

[32] *Herbert* v. *Allsop* [1941] N.Z.L.R. 370, 374. (General words of Emergency Regulations Act, 1939, s. 3 (1) held to authorize a regulation in effect empowering the Attorney-General to ban an organization—in that case Jehovah's Witnesses—if he thought that its activities had a subversive tendency.)

[33] [1942] A.C. 206.

and that by reason thereof it was necessary to exercise control over him and directed that that person be detained, a court of law could not inquire whether in fact the Home Secretary had reasonable grounds for his belief. The matter was one for the executive discretion of a Cabinet Minister. Shortly put, then, the words 'If the Secretary of State has reasonable cause to believe . . .' were construed, in the context of a wartime security regulation,[34] to mean 'If the Secretary of State honestly supposes that he has reasonable cause to believe . . .'

In harmony with that approach were such other leading decisions as *Rex* v. *Comptroller of Patents, ex p. Bayer Products,*[35] as to regulation-making powers. There it was held that, as His Majesty in Council–that is, the Government–had a statutory discretion to make 'such regulations as appear to him to be necessary or expedient for securing' certain specified purposes, the court had no jurisdiction to investigate the reasons or advice which moved the Crown to reach the conclusion that certain regulations were necessary or expedient for those purposes. One of the Lords Justices even seems to have suggested that the legislative reference to purposes was not intended to limit the power of the Government.[36] Again, in *Point of Ayr Collieries Ltd.* v. *Lloyd George,*[37] the doctrine of *Liversidge's* case was extended to a Minister's decision that it was necessary for the purposes of emergency regulations to take control of a business, a decision on a matter less immediately involving national security. Here it seems to have been held that even if it could be proved in court that the Minister had been misled by inaccurate information, the court could not interfere. And in *Carltona Ltd.* v. *Commissioners of Works*[38] another attack upon a requisitioning of property failed, notwithstanding that the letter giving notice of requisition stated the reason to be that 'the department have come to the conclusion that it is essential in the national interest . . .', words not to be found in the empowering regulations, wide as those regulations were. But the English Court of Appeal held that the discrepancy did not matter,

[34] That the decision lays down no general rule, but is limited to the context and attendant circumstances of the defence regulation in question is emphasised in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, 76-7, by the tribunal which may be supreme as far as the New Zealand courts are concerned, the Judicial Committee of the Privy Council.

[35] [1941] 2 K.B. 306.

[36] Scott L.J. at p. 311, but the passage is cryptic.

[37] [1943] 2 All E.R. 546.

[38] [1943] 2 All E.R. 560.

as an officer of the ministry explained in evidence that he had used the words as a sort of shorthand, a comprehensive phrase to cover all the grounds mentioned in the regulations. You will remember that the majority of the New Zealand Court of Appeal were not prepared to be as lenient as that in the analogous case of *Jensen* v. *Wellington Woollen Manufacturing Co. Ltd.*,[39] which had been decided in the previous year, although the dissenting judgment of Myers C.J. is on all fours with the later English decision.

AFTER THE WAR

Those decisions of the war period have excited criticism. But perhaps the critics themselves have thereby shown a lack of foresight. *Liversidge* v. *Anderson* and the like afford striking evidence that, despite complaints that are sometimes made to the contrary, the Judges of the twentieth century are no less capable than their predecessors of 'moulding the common law to meet the changing circumstances of modern conditions', to adopt the words of the present Chief Justice of New Zealand in a recent case;[40] and that, once fully convinced that new conditions call for some development in the law, present-day Judges are equally ready to take a forward step. Developments of this kind are evolutionary. They do not represent a break with the past. In the *Point of Ayr* and *Carltona* cases, Lord Greene M.R., who delivered the judgments, said that the courts were only concerned to see that the Minister acted *bona fide* and within the four corners of his statutory authority. In 1905 Lord Macnaghten, in the passage from the *Westminster* case that was mentioned earlier,[41] said much the same thing. The difference lies in emphasis. During the war it was necessary to emphasize that the court should not interfere with a discretionary decision reached by an administrator within the boundaries of his authority. At other times it may be necessary to emphasize that it always remains to the courts to ascertain, by a process of constructive interpretation if need be, where the boundaries lie.

But there can be little doubt that, in respect of administrative law, habits of judicial thought engendered in time of war survived

[39] [1942] N.Z.L.R. 394. It is questionable whether the New Zealand court would have admitted such evidence from an official to explain his written language as was received in the English case.

[40] *Taranaki Electric Power Board* v. *Stratford Borough* [1956] N.Z.L.R. 756, 762, per Barrowclough C.J.

[41] Pp. 87-8, above.

into the post-war years. Perhaps this was partly due to the existence in England of a Labour Government. However that may be, it seems a fair deduction that after the war the English Judges, studious of impartiality and anxious to avoid any hint that political prejudices influenced their decisions, continued to show a willingness to allow administrative discretion a very free rein.

For instance, in the much discussed decision in *Franklin* v. *Minister of Town and Country Planning*[42] the House of Lords held that in considering the report of a departmental inspector who had held a public local inquiry, as provided by statute, after objections had been made to an order designating an area as the site of a new town, the Minister of Town and Country Planning had no judicial or quasi-judicial duty imposed on him. Hence, it was held, considerations of bias in the execution of his duty were irrelevant. The sole question for the courts, in passing upon the validity or otherwise of his designation order, was whether he had considered the inspector's report and the objections, as required by the Act, in the sense that he had 'genuinely' considered them. So far the decision may be convincing, for English administrative law has been bedevilled by attempts to solve problems by applying the labels 'judicial' and 'quasi-judicial' to statutory powers. But surely it becomes much less convincing when the House finds that the Minister had not fore-judged any genuine consideration of the objections, although at an earlier public meeting he had said amongst other things, with reference to the site in question (Stevenage), 'It is no good your jeering; it is going to be done'; and 'The project will go forward'.

Judicial reluctance to infer that Parliament intended Ministers and their departments to preserve in their activities the appearance of fairness that is expected of Judges was also exemplified by *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health.*[43] This case concerned a Minister's statutory discretion to confirm compulsory purchase orders made by local authorities. The Act again required him to consider objections, so that in a sense he had to adjudicate between the local authority and the objectors. But only in a very restricted sense did Parliament mean him to act judicially, according to the decision of the English Court of Appeal. His was only, it was held, a quasi-judicial function; the local authority and the objectors were only quasi-parties; the dispute

[42] [1948] A.C. 87.
[43] [1947] 2 All E.R. 395.

between them was only a quasi-lis. You may think that the Members of Parliament who voted in support of the Bill in question would have been surprised to learn that jargon of this kind was needed to explain their meaning. The consequence of this conception of the Minister's function was that he was not obliged (and that means, of course, that his department was not obliged), before confirming the order, to disclose to the objectors two letters which the local authority had written to him about them. The letters were probably damaging: the first said that attempts to negotiate a voluntary sale had failed, the second said in effect that the objectors were a firm of speculative builders who were demanding an excessive price. The objectors, having belatedly learnt of the letters, said that in fact they had not even received any inquiries about a voluntary sale. The court held that the objectors were not entitled to an opportunity to controvert the letters, on the ground that they had been written before the local authority made its order and hence before the objections were lodged, and that the Minister was then acting in a purely administrative capacity. Perhaps that decision strikes those of you who are administrators as sensible and satisfactory; but one ventures to hope not.

Reference was made earlier to the principle of law that local authorities (and, it may be, other public bodies) are required to act reasonably in exercising their statutory discretions. This is not a very severe limitation. It may mean no more than that the courts can hold a purported decision invalid if it could not have been reached by a reasonable person correctly understanding the empowering statute.[44] All of us are legally bound to conform in various ways to the standards of the reasonable man. If in crossing the street we fail to show the degree of care habitual with him, we are in peril of having damages awarded against us, should an accident ensue. Presumably it is no less just that those who wield statutory authority should be expected to conform to the standard of the reasonable administrator. But in the post-war years the English courts showed some inclination to resile from this principle. In *Taylor* v. *Brighton Borough Council*,[45] the Court of Appeal rejected the argument that a local authority's power to insert restrictions in a town-planning scheme must be used reasonably, just as its power to make by-laws must be used reasonably. The

[44] *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 229-31, per Lord Greene M.R.

[45] [1947] K.B. 736.

reason given was that the ultimate sanction to the scheme fell to be given by a Minister. Yet, in England, by-laws normally require ministerial confirmation; and in a New Zealand case of 1915, *Rex* v. *Broad*,[46] the Privy Council in a judgment delivered by no less a lawyer than Lord Sumner held void for unreasonableness a by-law of general application to railway crossings throughout the country and made directly by a Minister under statutory powers.[47]

THE TREND APPEARS IN NEW ZEALAND

Tendencies in English judicial thought are usually repeated in New Zealand, sometimes perhaps too automatically, sometimes after an interval that may seem unduly long to the impatient. Whether because of English influence or because of changes in personnel, it could be argued that there was a period in this country after the war when the judgments of the courts in the field of administrative law were noteworthy for an approach contrasting with that of the Myers era. As one comes nearer home, both in place and in time, one treads on ever more controversial and more delicate ground. However, let us consider three cases.

As regards regulation-making powers, there is *Hewett* v. *Fielder*,[48] a case arising out of the waterfront strike of February, 1951. The situation was so serious that a Proclamation was issued under the Public Safety Conservation Act, 1932, declaring a state of emergency to exist throughout New Zealand. The effect of such a Proclamation is that power to make regulations under the Act arises. It is power exercisable by the Governor-General by Order in Council to make such regulations as he thinks necessary for certain specified purposes, one of which is securing the essentials of life to the community. The Waterfront Strike Emergency Regulations, 1951, purported to be made under the Act. They provided for the visiting of various penal consequences upon persons and unions who were parties to any strike to which the regulations

[46] [1915] A.C. 1110.

[47] The by-law provided '. . . every person shall, before crossing the lines of rail, comply with the directions upon the notice-boards, "Stop; look out for the engine" '. Lord Sumner observed that 'If it requires all passers-by to stop–that is to come to a standstill–and in that posture to look out for the engine at every level crossing and then go on, using, of course, the same proper care as would have been incumbent without any by-law, it must in a multitude of cases require persons who lawfully use the highway to go through an idle and irritating ritual on pain of an accumulation of convictions and a burden of penalties, which only the good sense and clemency of justices can save from being crushing'.

[48] [1951] N.Z.L.R. 755.

applied. It was for the Minister of Labour to declare a strike to be within the regulations. He could do so if satisfied of two things, first that the strike had caused or was likely to cause serious loss or inconvenience, and secondly that it had been brought about by any union or its members.

A difficulty is at once apparent. Regulations cannot be made under the Act merely for the purpose of ending a strike which is likely to cause serious inconvenience and which has been brought about by a unionist. As in some other cases that have been touched on, the regulations here seemed to lay down a different test from that prescribed in the parent Act. The Full Court sought to dispose of the difficulty in this way:

> It seems to us clearly within the ambit of the powers conferred by the Act for the Governor-General in Council to consider that any strike causing serious loss or inconvenience may interfere with the supply of the necessities of life to the community, and that it is necessary, in order to ensure the supply of necessities that the strike [by which the Court must have meant any strike causing serious loss or inconvenience] should cease as early as possible. If this view were not correct, then the words of the Regulation would be read as restricted to a strike causing 'serious loss or inconvenience' in the supply of the essentials of life or otherwise within the contemplation of the Act . . .

But does that reasoning in truth meet the difficulty? The regulations made the opinion of the Minister, not the Governor-General in Council or the Court, the criterion of the likely consequences of a strike. So, to uphold the regulations, it was necessary to assume that the Governor-General in Council considered that any strike which the Minister thought likely to cause serious inconvenience to someone might interfere with the supply of the necessities of life to the community. That is a large assumption. Conceivably, however, it might be warranted if a further assumption could be made, namely that the Minister was not free to 'declare' a strike unless he were satisfied not only that it was likely to cause serious inconvenience, but also that it might interfere with the supply of the necessities of life. In fact the notice by which the Minister 'declared' the waterfront strike recited simply that he was satisfied that it had caused and was likely to cause serious loss and inconvenience and that it had been brought about by members of a named union. What ground is there for concluding that the

Minister had addressed his mind to a stricter test than that conveyed by the ordinary meaning of the words contained in the regulations and reproduced in his notice? To justify the decision in *Hewett* v. *Fielder* that the regulations and the notice were both valid, it would seem necessary to hold that the Minister was bound to read into the regulations the restricted interpretation later suggested in the alternative by the Full Court, and that, with legal subtlety and prescience, he in fact did so.

No doubt considerations of convenience told strongly in favour of upholding the regulations and the notice. The great majority of citizens may have had little sympathy with those whose conduct caused the emergency. In one sense the decision of the Court might well be said to have been in the public interest. Yet is it not on just such an occasion as that of an acute and grave industrial conflict that the strength of the courts and the rule of law is put to the severest test? In England the decision of a Chancery Judge that the general strike of 1926 was illegal,[49] and the influential speech to the same effect by Sir John Simon in the House of Commons, have been much criticized by persons learned in industrial law for failure to face the real legal issues.[50] It is to be hoped that the doubts now expressed about the decision in *Hewett* v. *Fielder* can be shown to be fallacious, for it would be disturbing if that decision had to be regarded as in the same category.[51]

Then, as regards the powers of statutory administrative bodies and the rules of natural justice, there is the case of the satchel incident, *Campbell* v. *Holmes*.[52] A full account of the facts of the case, as contained in the law reports, and of the variety of legal questions arising therefrom would be out of place here. It must suffice to say that the Public Service Commission decided to annul the appointment of the plaintiff 'because of the attitude of gross disobedience to authority which he had displayed'. He had been given no opportunity of challenging or explaining the material upon which the Commission reached this conclusion. In the Supreme Court it was held that, although he was still a probationer

[49] *National Sailors' and Firemen's Union* v. *Reed* [1926] Ch. 536.

[50] See e.g. Professor Goodhart in 70 L.Q.R. 178-9.

[51] Another questionable decision on delegated legislation was *Hazeldon* v. *McAra* [1948] N.Z.L.R. 1087, where the Full Court held that a by-law 'regulated' the use of a reserve, notwithstanding that it left the question whether any public meeting could be held there to the unfettered discretion of the town clerk.

[52] [1949] N.Z.L.R. 949.

in the service, he was entitled not to be judged unheard. The decision that the annulment was unlawful was affirmed on appeal, but for different reasons. The Court of Appeal held that the plaintiff was an 'officer' and not a probationer, and was therefore entitled to the benefit of a statutory provision as to inquiries which provided the machinery for disciplinary action when complaints or charges were made against officers. Had he been a probationer, the Court inclined to the view, although it was unnecessary to decide the point, that he could have been dismissed summarily without any hearing. The latter proposition is doubtless correct as a general rule. But when a man is dismissed from the service of the State, under statutory powers, on the ground, publicly proclaimed, that he has been guilty of gross disobedience, surely the law is not so weak, nor should Parliament be presumed to be so unjust, as to deny him a right to a hearing. There is old and good authority in the English reports that no man is to be condemned unheard.[53] The judgment of Gresson J. at first instance in the *Holmes* case may prove to be as consonant with the law of the twentieth century as it was with the law of the eighteenth and nineteenth centuries.

WEIGHING THE ALTERNATIVES

Although at the moment your impression may be otherwise, we have considered only a handful of judicial decisions. You may not share the doubts adumbrated with regard to some of them. But enough may have been said to show that there does seem to be a difference in emphasis between the Myers era and the period just considered, that in the later period the courts seemed less ready to play a constructive part in the evolution of administrative law. This is not to overlook the possibility of taking another view altogether. Particularly when one is somewhat remote from the practical problems caused by the clash of administrative discretion and private interest, it is quite easy to be persuaded that the alarm which some express at the present state of administrative law is grossly exaggerated. Closer contact with these matters, however, disturbs complacency, at any rate from the citizen's point of view. As administrative powers inevitably proliferate, the system of ministerial control and ministerial responsibility to Parliament seems increasingly inadequate to ensure

[53] E.g. *Dr Bentley's* case (1723) 1 Stra. 557; *R.* v. *Gaskin* (1799) 8 T.R. 209.

justice in the individual case. It is surely neither an object nor an effect of the system that one of a Minister's primary functions should be to act as a detached adjudicator upon complaints of particular instances of alleged injustice; and, as the Attorney-General has explained,[54] only rarely is a departmental decision reversed as the result of appeal to the Minister. Nor would it be suggested that such safeguards as systematic ministerial scrutiny of proposed delegated legislation, valuable though they must be, can be a substitute for independent judicial review.

Therefore, if the courts appear reluctant to use a firm hand in adjudicating between the Administration and the individual citizen, is there not a case for a new supreme administrative tribunal? And is not the argument strengthened by the occasional coming to light of an instance of abuse of authority which it is doubtful whether even the most resolute court of law could remedy? In such a case a citizen's interests may have been unfairly or even deceitfully harmed, but it may not be possible to point to any legal right of his that has been infringed. Crichel Down, it has been said, will become part of the folklore of England. The facts of the affair need not be detailed now. They expose, it is generally thought, an attitude of cynicism on the part of certain officials in dealing with private citizens, a failure to comply with the standard of professional ethics expected of administrators by the Public. The United Kingdom Government was at length persuaded to appoint a special tribunal to inquire into that case. Should not there be a permanent tribunal charged with the function of hearing all complaints of the same kind?

Yet one suspects that the balance of informed and moderate opinion is against the proposal at the present time. In England it is not favoured, for instance, by Professor E. C. S. Wade.[55] In New Zealand Dr Robson and Professor Scott express a similar view in their section on Administrative Tribunals in the recently published book on this country's laws and constitution.[56] And, for a number of reasons, it seems the better view.

[54] Cf. p. 61, above.

[55] *Law Reform and Law Making,* a Reprint of a Series of Broadcast Talks (Heffer, 1953), p. 53. The Franks Committee on Administrative Tribunals and Enquiries has now reported adversely to the proposal (Cmd. 218, 1957), and for the present the likelihood of its adoption in England seems remote.

[56] *New Zealand, the Development of its Laws and Constitution* (Stevens, 1954), p. 128.

In the first place, if it were successful, a supreme administrative court might be expected to attract to itself a considerable volume of work. Continental experience certainly suggests so. In 1953 the judicial wing of the French Conseil d'Etat, for example, was said to have 24,000 cases awaiting attention, a situation which provoked from an eminent English constitutional lawyer the remark that an institution with a back-log of work of that order should be abolished, however theoretically perfect it might appear.[57] No doubt the very existence of such a tribunal encourages complaints against the administration, many of them ill-founded. But the more serious disadvantage, especially in a small country, might be the call upon administrative manpower that the tribunal would entail. Can we afford to turn some of the cream of the Public Service into judicial officers? Obviously the innovation would not succeed unless the tribunal were composed of persons of very high ability, some of whom had wide administrative experience. Any Government must be reluctant to divert persons of that calibre from the more active and positive role of advising Ministers and implementing policy.

In the second place, there arises the problem of independence, impartiality and public confidence. The body usually taken as the paradigm of a successful tribunal of supreme administrative jurisdiction is the French Conseil d'Etat. So far as a foreign observer can judge, this emanation of bureaucracy does indeed at the present day hold the confidence and respect of citizen and official alike. But its current status has not been achieved swiftly or without vicissitudes, and it may owe much to the fact that its modern origin is Napoleonic and almost coeval with post-Revolutionary France. Legal practitioners in New Zealand know that no matter how impressively the proceedings of administrative tribunals may be conducted–and some of our administrative tribunals attain a high standard of procedure–the layman subject to their jurisdiction is apt, rightly or wrongly, to be sceptical about the degree to which they are in fact immune from undisclosed pressures and influences. No supreme administrative tribunal, when first constituted, could hope to escape this sort of suspicion.

[57] An attempt is being made in France to meet this difficulty by transferring to local administrative courts some of the Conseil d'Etat's first instance work: see Hamson, *op. cit*, p. 96. Presumably the problem is to ensure that a large measure of devolution does not entail a decline in the standard of such work and a frequent desire to appeal to the central body.

Only experience, perhaps extending over many years, could show whether the new tribunal could attain genuine independence and impartiality and, equally important, whether those subject to its jurisdiction would come to believe that it possessed such qualities.

In the third place, one of the advantages claimed for such a tribunal is that its jurisdiction would be more far-reaching than that of the Supreme Court. It would be concerned with the merits of administrative decisions and the interests of citizens, not merely with the legality of administrative decisions and the rights of citizens. In other words, it would have an appellate and not merely a supervisory jurisdiction. But it is asking a great deal to expect one body to unite in its members all the technical and specialized knowledge and experience desirable for the discharge of duties so extensive. Take a few instances, selected almost at random. Could the same body dispose satisfactorily of appeals from the Price Tribunal, the Local Government Commission, the Apple and Pear Marketing Board, the Air Services Licensing Authority and the Government Service Tribunal? The question of rights of appeal seems best approached empirically, the tribunal and the extent of the right being adjusted to the particular subject-matter.

In the fourth and final place, the Supreme Court and Court of Appeal of New Zealand possess a jurisdiction equivalent to that possessed in England by the Supreme Court of Judicature. The latter Court unites in modern form the Royal Courts of Justice. Despite various setbacks and challenges from other authorities, they have endured for seven centuries as the supreme judicial institutions of England. At any rate since the Act of Settlement secured the independence of the Judges, they appear to have held the scales between Crown and subject to the general satisfaction (criminal matters excepted) until very recent years. The mana of the Supreme Court is still strong in New Zealand. This is shown by the fact that citizens concerned in proceedings before administrative tribunals undoubtedly value the safeguard of any statutory right of appeal to that Court. Perhaps it is not simply professional prejudice that leads to the view that no part of the jurisdiction of the Supreme Court should be taken away, nor should anything be done to diminish its importance as a basic institution of the national life, unless the arguments for the change are so cogent as to be beyond substantial dispute.

A TURN OF THE TIDE?

Notwithstanding those reasons, we can hardly rule out finally the project of a supreme administrative tribunal. If the ordinary courts were, for the first time in their history, to prove unwilling or unable to meet the challenge of new social conditions, then, however reluctantly, the community would have to try to devise appropriate new institutions. But, of course, it would be a sad day for the status of the Supreme Court if that were to happen. In fact the indications seem to be that it will not happen. For, just as the emphasis of the cases appeared to change some years ago, so now it appears to be changing again. The flexibility of administrative law is once more enabling the courts to meet the demands of the time.

In England there have been important decisions to the effect that the courts will grant the modern discretionary remedy of declaration in cases where the traditional remedies of certiorari or damages would be inadequate to redress an injustice suffered by a citizen by reason of an invalid decision by an administrative tribunal or authority. The first of these decisions, *Barnard* v. *National Dock Labour Board,*[58] was made by the Court of Appeal. But the latest decision, *Vine* v. *National Dock Labour Board,*[59] has been made by the House of Lords itself, so that the law of England has irrevocably taken a forward step. *Vine's* case is also important because the House held that a certain statutory power to dismiss a workman for alleged breach of his duties contained a judicial element, or at all events that it could not be delegated. The speeches delivered in this case are very valuable for their tendency to discard the conceptual approach, involved in terms like 'quasi-judicial', which has so impeded English law.

Then, the English Court of Appeal has affirmed that the writ of certiorari may be granted to quash the decision of an inferior tribunal, not merely on the ground of excess of jurisdiction, but also if an error of law (for example, in the construction of a statute) appears on the face of the proceedings: *Rex* v. *Northumberland Compensation Appeal Tribunal;*[60] *Regina* v. *Medical Appeal Tribunal.*[61] These decisions were said to have revived a principle of law and practice long established but overlooked in

[58] [1953] 2 Q.B. 18.
[59] [1957] 2 W.L.R. 106.
[60] [1952] 1 K.B. 338.
[61] [1957] 1 Q.B. 574.

recent times. Research might show that in truth they have brought about a somewhat subtle, yet potentially important, change in the law. It may be that the old authorities now resurrected did not draw an analytical distinction between error of law on the face of the record and excess of jurisdiction. But that is a technical question. The important point is that these cases have involved a salutary extension of judicial control; for in both, through mistakes of law, the statutory tribunals concerned had failed to award to displaced or disabled employees the compensation to which they were entitled.

Another extension of judicial control has been made by the English Court of Appeal in *Prescott* v. *Birmingham Corporation*,[62] although in this instance there may be more room for disagreement upon whether the result was salutary. The corporation had decided to provide free travel on their buses for certain classes of old persons. The cost would be about £90,000 a year and was to be met out of the general rate fund. The statutes authorizing the operation of the transport undertaking empowered the corporation to charge such fares as they thought fit. Yet it was held that in adopting the scheme they had misapprehended the nature and scope of the discretion vested in them; the legislature must be deemed to have intended the undertaking to be run as a business venture; local authorities owe a fiduciary duty, analogous to that of trustees, to their ratepayers; and in the absence of clear statutory authority it was illegal for the corporation to make a gift in money's worth to a particular section of the community at the expense of the general body of the ratepayers. That was undeniably a strong decision; but, like some of the New Zealand cases of the Myers era, its justification can be found in the view that specific statutory provisions, revealing unequivocally the real intention of the legislature, should be required to authorize such far-reaching policies.

Once again there are some signs that the new trend in England may be matched in New Zealand. For instance there are the two decisions of our Court of Appeal on the right to a hearing; the *Okitu*[63] case, where the Dairy Board was held bound to grant a hearing to a company prejudicially affected by a new zoning order, before making that order as the result of complaints by a

[62] [1955] Ch. 55.

[63] *N.Z. Dairy Board* v. *Okitu Co-operative Dairy Co. Ltd.* [1953] N.Z.L.R. 366.

competing company; and the *Licensed Victuallers'* case,[64] where a decision which, it may be guessed, was somewhat surprising to the Price Tribunal itself, to the effect that the Tribunal was never bound to act judicially in fixing prices, was varied on appeal. The approach adopted in these Court of Appeal decisions appears to have much in common with that more recently adopted by the House of Lords in *Vine's* case, which has already been mentioned. The points upon which all three cases turned were basically questions of statutory interpretation. But, as happens so often in administrative law, the process of interpretation called for constructive, and almost creative, work. The increasing willingness on the part of the courts to grapple with our administrative law in this way, together with the increasing attention necessarily paid to the subject by practitioners and academic lawyers, may show that it is a much more effective body of law than its critics allow. Perhaps in time even an affair like Crichel Down might be brought within the reach of judicial review, with the help of the concept that administrators are trustees of their powers for the Public.

And there is this last consideration. The Attorney-General has recently announced that the appellate system of the ordinary courts in New Zealand is to be changed. There is to be a separate Court of Appeal, composed of Judges who will not be burdened with Supreme Court work as well. It is sometimes said, especially in the Press, that the main advantage of the change will be the avoidance of unnecessary delays in the administration of justice. But one ventures to suggest that this, although unquestionably desirable, is a secondary matter. The important point is that the members of the new Court of Appeal should have better opportunities to attain the high standard of appellate work which this country is capable of producing; to keep abreast of current needs, developments and thought; and to achieve a coherence of approach and outlook in their decisions. Having regard to the hopes naturally entertained for the success of the new court, and the various other considerations already mentioned, it seems reasonable to conclude that as yet there is not a sufficiently strong case for subjecting bureaucracy to a wholly different jurisdiction.

[64] *N.Z. United Licensed Victuallers Association* v. *Price Tribunal* [1957] N.Z.L.R. 167.

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THE DISCUSSION

Mr P. J. O'Dea thought that the speaker, in emphasizing the merits of the ordinary courts, should have mentioned the high cost of litigation. Mr Cooke replied that in his opinion complaints about cost were exaggerated; he did not believe that anyone in New Zealand who had a meritorious case was deterred from bringing it merely by lack of means. The legal profession had certain traditions in this respect.

Mr J. Russell Hancock proposed that there should be more extensive legal remedies available to the citizen when he thought that administrative discretion had been exercised unfairly; the absence of such remedies was perhaps responsible for the bitter relations between officials and some members of the Public. Mr Cooke, while pointing out that it was always possible to appeal to the Minister, said that he agreed with Mr Luxford's view, advanced in the opening discussion, that some *ultra vires* decisions go unchallenged in the courts; some citizens were hesitant to fight what seemed to them to be the all-pervading power of the State. He considered that some of the Public's resentment against regulation was really a complaint against Parliament, which had decided that certain powers should be given to the Government.

Mr E. J. Haughey discussed the composition of administrative tribunals, and both he and Mr Cooke believed that these tribunals should give reasons for their decisions.

Mr E. K. Phillips examined the difficulties the courts had encountered in their previous attempts to apply concepts such as 'natural justice' and 'quasi-judicial' decisions. Mr Cooke agreed with him, and said that the courts, in his opinion rightly, were now beginning to pay more attention to the actual wording of acts conferring powers. Professor C. C. Aikman referred to the role of public servants in helping to formulate amending legislation designed to permit discretion in circumstances where its use had previously been declared illegal by the courts. He referred also to the increasing frequency of legislation which took the right of review away from the courts. Mr Cooke thought that Members of Parliament, as well as public servants, might be more fully informed of these dangers.

The Professional Ethics of Administrative Discretion

P. B. MARSHALL

I am saddened by the name given to the general theme of this convention–Bureaucracy. This word has in the public mind, and indeed in the expert mind also, a connotation the very opposite of the work covered by my subject. Bureaucracy is not a happy term to attach to the work of the Public Service, in general, and in particular to the very wide and exacting activities of certain departments which have a considerable measure of administrative discretion–namely my own former department (Industries and Commerce), the Treasury, External Affairs and Customs, to mention those I know best.

However, as I listened to the speakers and to the questions that were raised from the audience, I became pleased instead of saddened that the Institute of Public Administration had had the courage to embark on the general theme of bureaucracy. It is perhaps natural that the critical examination of the last few days has been directed at the Public Service. It may be that at some other time an examination of bureaucracy, as some of us may consider it to exist in private enterprise, public corporations and possibly even the Press, could be undertaken with advantage.

STANDARDS OF BEHAVIOUR IN THE PUBLIC SERVICE

There is a well chosen word in the title of my paper–'professional'. The Public Service in New Zealand is a profession with its traditions, its standards of value and behaviour, its restraints,

its high regard for the public interest and its level of performance. In any profession there are many elements which make up the standards of quality and behaviour of the group. In some cases these standards have the backing of legal sanction; the medical profession is a case in point. Another interesting example is the profession of law. Here standards are maintained, not only by the entrance qualifications and the methods of entry into the profession, but also by the rules of the Law Society. There are other professions, with a status protected by examinations, some of which are prescribed in the United Kingdom.

The Public Service, however, has no ordinance laying down its standards of behaviour, nor has it an entrance examination which sets the high level at which the Public Service aims. Of course, the Public Service Commission has the right to dismiss public servants, but this somewhat negative sanction is not a determining factor in promoting the high professional ethics which I believe are to be seen in the New Zealand Public Service today.

What is the source of the professional standards of the Public Service? First is the Public Service Act of 1912. Second are the traditions of the British Public Service, which have come to us partly by study and partly by association. A feature of the life of the senior public servant in many departments is association with his fellows in or from other countries on matters of international concern in his field; by a process of social and intellectual osmosis, the New Zealand public servant absorbs something of the behaviour patterns and some knowledge of the standards of attainment in other countries. The Public Service of the United Kingdom is the one with which New Zealand has had most association, generally with the administrative class which, in essence, consists of men and women with high academic attainments as well as other superior personal qualities. While the New Zealand Public Service is not recruited by means of the same stiff examinations as those passed by entrants to the administrative service in Great Britain, nevertheless its professional ethics are of the same type. This immediately suggests that there may be other reasons for the ethical standards of the New Zealand public servant. One is the social conscience which is traditional in New Zealand; it is expressed in the platforms of each of the political parties and, of course, reflects New Zealand itself. A pragmatic social idealism, together with the egalitarian sense of New Zealanders and their sense of social and economic, as well as legal, justice, have all constituted strong elements in the moulding of

the standards of the New Zealand Public Service. The public servant is not merely a person engaged in working for a living; he is a person who, in addition, feels that he is contributing to the public welfare and the building of New Zealand. And, because he expresses in his work the social conscience of New Zealand, he has a pride in his occupation.

There are other factors which have contributed to the high ethical level of the public servant. One of these is our parliamentary democracy. In New Zealand a Minister is subject to criticism, and even abuse, which is not levelled at men in other fields of endeavour in New Zealand. Add to this the doctrine of a Minister's responsibility for departmental actions and the custom of the Minister being the mouthpiece of the department, and we get the likelihood of every minor action of every civil servant being raised in the highest public forum, Parliament. The New Zealand public servant must not only be beyond reproach but he must be seen to be beyond reproach.

Another element in the moulding of the behaviour patterns of the Public Service is the Press. Every newspaper keeps a watchful eye on the Public Service. The newspapers often give credit to the essential work and high achievement performed by government servants, but they are always there to publicize any action which might be thought to be 'bureaucratic'. Allied with this watch-dog function of the Press is the watch-dog function of the Public. The Public are tax-payers, and the public servants are *their* servants, and any act by a public servant which can occasion offence to a member of the Public could easily be the cause of complaints which could go as far as members of Parliament, if not to a Cabinet Minister and even to the Prime Minister.

New Zealanders may be easy-going, but they have an unrelenting gaze on those who do their work for them. They have an appreciative attitude towards the public servants they know–that is, the postman, the teacher, the railway man, the broadcasting announcer, the forest ranger–but they are suspicious of those they do not know; and the ones they do not know are usually sitting at desks.

INTERNAL CHECKS ON PUBLIC SERVANTS: THE PUBLIC INTEREST

It is the public servants who are sitting at desks who are rightly regarded as the people who make the decisions and, as few of the Public know them, the way they operate is to most people a

complete mystery. Yet despite this, those who make the decisions are making them as though the full glare of publicity might be turned on them at any moment; that is, the public servant has developed a sensitive conscience that he is serving the Public, and will be prepared to stand by his decisions if there is any inquiry. In fact, care is taken in reaching decisions to see that the record shows *how* the decision was reached and *who* finally made it. This development has been evolved over many years, and one of the reasons for its success is that there is a file containing all the relevant papers, and every departmental officer can read from that file the views expressed by his colleagues. And, as the departmental officer is continuously exercising judgment on similar problems, he can quickly see any tendency to weakness in another man's decisions. This internal check is a machine continuously in operation to promote carefully thought-out and just decisions.

The word 'just' is important here, for it is a contributing factor in the professional ethics of the public servant. His job, unlike the jobs of many people in other walks of life, is directly to serve the public interest this year and also in the years ahead. He is trained to assess what the public interest is. The result is that any recommendation which might result in lessened national wellbeing is regarded as conveying a suggestion of failure, of a job not well done. Serving the public interest in fact sets up its own quality standards. Admittedly, there can be various views of what constitutes the public interest, and the existence of our parliamentary democracy and of our political parties shows how these divergencies are often crystallized on subjects of importance to the electorate as a whole. The Government of the day therefore expresses for the years in which it is in office, the views of the majority of the Public and the general tendencies it wishes to develop in our social and economic affairs.

For example, in recent years the objective of full employment has been regarded by the two main political parties as a desirable objective, both from the point of view of maintaining the greatest volume of production and also for strong social reasons. The public servant will therefore always have this broad objective in mind. This does not mean that all other objectives will be subordinated to this one, but it means that the public servant's recommendations should be such that their general tendency is to promote the full employment of all our resources, just that and no more.

But there is a difference between a political platform, the laws passed by Parliament and the administrative decisions of Cabinet and the Minister. The people of New Zealand have expressed through their representatives what they want the law to be. The law is quite often specific on the meaning of the term, 'public interest'. When there is room for discretion at the ministerial or government level, then the political philosophy of the Government will be a guide to their decisions, and the particular administrative attitudes of the Minister will often provide a framework in which departmental decisions can be taken.

There have been laws in New Zealand from the beginning of our history, whether customary law or statute law, and the law and administration of the past have an important bearing on administration today. Most of our senior public servants have spent over a quarter of a century in administering the laws and policies of government at various levels. A quarter of a century takes us back to the dark days of the depression, through six years of war and several more years of a period of economic controls, which necessarily followed the economic and social upsets of war. These controls included rationing, settlement of returned soldiers on farms and in businesses, and control of prices in a potentially unstable situation. Frequent alterations in the law may be quite unable to keep pace with changing times. The result is that of necessity the senior public servant can rise to the top only if he is flexible, long-sighted and administratively intelligent. The very pressures of tradition, parliamentary democracy and changes in the economic and social climate, force to the top the public servant best fitted to deal with them. It can therefore broadly be said that the senior public servant is in a very good position to make recommendations based on the public interest; the fact that he must not fall short has developed in him a pride in his work and a standard of performance, which are not measured sufficiently by the level of public esteem in which he is held that is if we were to judge by his remuneration.

This does not mean that the community does not in another way esteem the public servant; the community does. This may be seen in the high standards of deportment which it quite unconsciously expects of the public servant.

I have made the point that the law of the land, the pronouncements of the Government or some judicial tribunal often determine the criteria which govern the majority of decisions by public

servants. Nevertheless, there is, within the criteria, an area where the public servant must use his administrative discretion. I have also suggested that in all cases the public interest is the determinant of the decision.

HOW ADMINISTRATIVE DISCRETION IS EXERCISED

I shall endeavour to give some illustrations of the use of administrative discretion in the Department of Industries and Commerce, and I hope that the examples I use are not too esoteric. In the course of its day-to-day work the department advises, in addition to the Minister, the Board of Trade, the Price Tribunal, the Capital Issues Committee, the Comptroller of Customs, the Reserve Bank, the Building Controller (until building control was lifted), the Motor Spirits Licensing Authority, the authority administering licensed industries and the Cinematograph Films Licensing Officer.

Let me first show the elements which are taken into consideration in judging the public interest when an application is made to the Licensing Officer for the right to show films in a specific area. When an application for a licence to exhibit films is referred to the department for its recommendation, the officer handling this work (who, incidentally, handles a great deal of other work also) is required to consider under the regulations such points as whether the granting of the application is in the public interest, having regard to the conditions existing in the industry, to whether there are existing or previous holders of film licences in the locality concerned, and to whether the granting of the application would cause unreasonable hardship to existing licence holders. Here we see at least three variables. One is the public interest, the other is the 'conditions existing in the industry' and the third is 'unreasonable hardship'.

On such an application a far-reaching and careful examination is conducted. The investigating officer concerned must first of all have the ability to select the facts among the miscellany of data which are really relevant to a recommendation. Here are some examples of the points which he has to consider: What is the existing population in the area and what is its trend? Does the population consist of wage-earners, scattered farmers, or is it a mixed area containing people of differing income groups, ages, and means of transport? What is the regular transport available to and from the theatre, e.g., taxis, trams, buses? Is adequate parking space available? Is there, or would there be, congestion of traffic?

What are the possibilities of industrial development in the area? What of the theatre itself; would it be adequate and attractive enough to cater for the required audiences; would the audiences be sufficient to make the business economic; what is the proposed seating capacity, type of films to be displayed? Is it intended to introduce wide screen or other variations of the conventional screen? What would be the charges for theatre tickets? What are the existing film services in the locality? To what extent would the granting of the application take away trade from the existing theatres? How would the granting of the application affect the competitive demand for the limited supply of the most popular films? It may be necessary to examine financial accounts and draw relevant conclusions from them.

It is clear that the type of material which the investigating officer seeks is mainly economic, but partly social in nature. One of the objects of the investigation is to prevent economic waste and so, in the long run, to promote economic welfare. But in doing this the recommendation must have regard to immediate service to the film-viewing Public and be just, as far as possible, to competitive enterprise. These considerations are weighed up and recommendations made. The Licensing Officer then exercises his judgment. Here, as in other fields, long acquaintance with the industry has built up a wide and extensive body of specialized knowledge and awareness of all facets of the problem, and realistic and sound judgment in weighing the facts. Inevitably, there is a long history of cases and precedents as a guide.

It is perhaps not surprising to find that the administration in a department such as that of Industries and Commerce uses the methodology of the administration of law. Because of the very nature of the administrative process, the department cannot hold open court on all the thousands of inquiries it is making each day; but it does weigh evidence carefully. In fact, it seeks evidence which might not otherwise be on the application before it. It has its own internal procedures where judgments are involved. It acts in accordance with precedents laid down, and it keeps a record of its evidence and its judgments.

According to a version of the theory of the Separation of Powers, the executive side of Government does not make laws nor act as judge. The theory is that Parliament states the law, the Executive puts the law into operation, and the Judiciary examines whether the law applies to the given facts. What has happened in New

Zealand, as with many other countries, is that the administration has been compelled by circumstance to become a delegated law-maker and, to some extent, a delegated judicial court. Indeed, the three arms of Government are not quite as distinct as might be imagined. In fact, Cabinet directs both legislation and administration. Parliament has the power to call offenders against its privileges to the bar of the House. And, just as the courts determine conflicts between individual people, so Parliament decides, in effect, between conflicting sections of the community. The courts also, by developing case law, sometimes have a legislative function. They also occasionally have administrative powers–for example, sentencing offenders and trustee functions. We see, therefore, that all three arms of Government overlap and assume, to some extent, functions of the others.

As the subject-matter of Government becomes more technical and complex (for example, safety precautions in civil aviation or the licensing of industries), so more discretion must be left to the executive. This is necessary also to provide for flexibility and even to provide for unforeseen contingencies.

Many books have been written on this topic, and perhaps I could merely summarize here the pattern that we follow in New Zealand: the statute tends to define broad policy; regulations made under the statute make more specific rules; and there is administrative discretion for application to particular cases. As the regulations must be *intra vires* the statute, so the administrative discretion must be *intra vires* both the statute and the regulations. Nevertheless, administrative discretion is often both wide and responsible. The judicial nature of administrative discretion is often not obvious, but it exists in most forms of administrative activity that require judgment beyond the mere routine. In his recommendations to the Minister and in his own decisions, the civil servant is continuously weighing the merits of conflicting claims between individuals, between sections of the community and between different areas of the country and, most importantly, between the interests of the present and future generations. In his recommendations, the public servant must sift the facts, decide which facts to ignore, which to mention to the Minister and which to stress. He must present, not only the case, but all sides of the case; and he must be his own judge of what is admissible evidence. When he makes a decision within his own competence he is not only the advocate for all sides but the judge also.

The objectivity and impartiality which are usually taken to be special qualities of the bench are not less essential attributes of the civil servant. The bench, however, is guided by canons of human behaviour and of property rights which are the main subjects of law. And in law they are delimited by more or less arbitrary boundaries. Law is essentially, like most other subjects, an exercise in definition and classification. The judge's task is to determine whether a set of facts and events comes within certain fixed boundaries. If so, the legal consequences follow. By judicial standards the boundaries must be fixed arbitrarily to some extent and also fairly rigidly, so that the citizen will have the ability to know in advance as far as possible his legal rights and duties. For example, 'night' in the Crimes Act means any time between 9 o'clock at night and 6 o'clock in the morning no matter how bright the sun may shine in midsummer at 5 a.m.; an offender is guilty of 'breaking and entering' at a defined point–when the tip of his jemmy appears on the inside of the door jamb, for example. Legal boundaries can be enlarged; they are still boundaries even though in some branches of the law, such as negligence for example, the boundaries seem very vague and flexible.

The public administrator's fields are not so closely defined. He has more room for discretion than a judge, and this makes his task in some ways more onerous. Moreover, while in most cases an individual person can appeal to the courts against an unjust administrative decision against him, there is no appeal that the community as a whole or posterity can bring against an administrative decision that is harmful to society in general. The senior public servant is aware of this and of the heavy responsibilities which it connotes. The public administrator must have more room for discretion because he is dealing with details and technicalities and is administering individual cases. His rules cannot, for these reasons, be hard and fast, and yet he must move from precedent to precedent, without being so bound by what has gone before that rigidity becomes absurdity.

Just as the medical, legal and accounting professions have their codes of ethics, remarkably similar in many ways, so the profession of public administration also has its code. One of the big differences between the code of the public servant and that of other professions is that a larger part of the public servant's code relates to his duties to the community as a whole and to the rights of the individual person. There is little in the public servant's code

setting out his obligations to his colleagues. The obligation to a colleague which does exist in the Public Service (although the code is unwritten) is one of not limiting the colleague's ability to carry out his responsibilities, or, more positively, whether he is in the same department or another department, assisting him with information which may help him to do a better job.

There is one qualification to this generalization–one set of public servants is sometimes forbidden to divulge any facts to another set of public servants outside the department. I am referring here not to secret work involving national security, but to information which has been given to a department confidentially so that it can carry out its functions. For example, the material which the Government Statistician collects from individuals is confidential, and is never divulged to other departments, even though it might help in their administrative duties. Similarly, the information in one's income tax return is confidential to the Inland Revenue Department. There are other examples of this. In the Industries and Commerce Department information is often received confidentially, and is kept confidential: indeed, information obtained by, say, the Price Control Division on pricing matters cannot be used by another division in the same department. With this qualification, however, the code of ethics of the public servant includes the obligation to assist a fellow public servant in carrying out his functions.

ADMINISTRATIVE DISCRETION IN IMPORT LICENSING

Let me now give another illustration of administrative discretion in the Department of Industries and Commerce. Each year the Minister of Customs announces in a Licensing Schedule the methods of handling the different types of import control which still remain in New Zealand today. This Licensing Schedule has in the last few years been arrived at after exhaustive investigations by the Board of Trade and after its recommendations have been considered by the Minister and the Government. It may be that the criteria for administering import control laid down at the beginning of the year prove to be inapplicable in a changed economic environment six months later. The criteria need to be changed. In some cases the criteria will be changed by a Minister issuing a direction to the department; in other cases, probably the majority, the Minister may have delegated the work to the department before the need to alter the criteria arises. In these other

cases there is a well-defined procedure for making the change. The division administering import control recommendations makes an exhaustive survey, and puts forward recommendations showing why there is a need to change the criteria. This recommendation then comes before an advisory committee, consisting of the three Assistant Secretaries of the department under the chairmanship of the Assistant Secretary concerned with industrial development. Each member records his judgment, and if there is any problem that cannot be solved by this committee, it is referred to the Secretary of the department for his decision. Everything is recorded. The decision is then a definitive guide to the officers administering the particular commodity concerned.

From this description it may be seen how administrative procedure is carefully devised to ensure that the public interest is served, and that decisions are made on carefully determined criteria. But there are hundreds, indeed thousands, of cases of day-to-day decisions which the administrative process also protects so as to reduce to the minimum the area where independent judgment is required. In this area again there are procedures to ensure that the public interest is served. To support these general statements some examples may be quoted.

There is a category of imports called 'D' items. No imports are permitted under the tariff heading of 'D' items until it is decided to make such provision, and licences are granted only in exceptional circumstances. 'D' items cover those cases where New Zealand domestic industry is capable, in a broad sense, of meeting the whole demand. However, the Customs tariff was not drawn up with the object of administering import controls, and while the Customs item may broadly describe the goods for which New Zealand can supply the full demand, there may be some particular types of the commodity covered by the Customs heading, which are not made in New Zealand.

An example of this is Tariff Item 338 (12)–wireless broadcasting receiving sets. New Zealand industry is well able to supply our needs for radio sets. Nevertheless, imports are allowed for (a) manufacturers' samples and (b) communication receivers. These are not made in New Zealand, and differ completely in type and use from the normal domestic radio set. These two exceptions illustrate administrative discretion at work. The first heading discretion is necessary. It is, of course, impossible to eliminate the area of discretion entirely, but, where there is discretion, the

but nevertheless covered by the tariff item. In each of these cases conferences have been held in the department, and thorough investigations have been made and criteria established to determine whether or not an item can be described as not supplied by the New Zealand industry. This may seem a prosaic illustration, but it is precisely in these fields that administrative discretion requires greatest wisdom and flexibility.

There is another import licensing category where even greater problems arise in the exercise of administrative discretion. These are called 'SD' items–that is, 'Special D'. There are no imports provided for in these items, but applications are considered for licences to import particular goods of a kind not made in New Zealand, and covered by the tariff item concerned. Here the goods applied for must be so different from the kind produced in domestic factories as to perform a different function from those to which import prohibition is meant to apply. No officer of the Department of Industries and Commerce can make a recommendation on one of these items, unless it has been considered thoroughly by senior officials at least up to the level of Divisional Director, or probably Assistant Secretary, and the comments of each officer appear on the file. In this way it is possible to arrive at a decision which carries out the intention of the Government when it placed an item in a particular import category. An example would be Tariff Item Ex 205(6)(a)–motor tyres and tubes of specific sizes made in New Zealand. Notwithstanding the fact that this tariff item is deliberately meant to apply to motor tyres made in New Zealand, licences have been recommended under this heading for special types of metallic and semi-metallic tyres, which are reinforced in the walls and tread with steel wires. These tyres are specially suitable for certain forms of public transport and for commercial vehicles carrying heavy loads and operating under difficult road conditions. Thus, the administrative discretion of the department is used both to promote the aim of the Government in its decision that the New Zealand industry shall supply the New Zealand demand for tyres and, at the same time, that the special field, where the New Zealand industry does not exactly produce the type required, shall be catered for.

An example from yet another category, is the type of import control items which is called 'OD' (other than 'D'). This category was deliberately created by the Government to allow a percentage of imports into New Zealand in a field where the local industry

was well able to supply the quantity of goods described by the item. The idea was to add variety and range to the goods available, to bring new types before the Public, including the manufacturers, and to stimulate quality competition. Not much imagination is needed to see how difficult it is to administer an item such as this. Tariff Item 136/6–men's and boys' outerwear–illustrates the difficulty. For some years, Government policy was not to import men's and boys' outerwear. When the decision was made to allow a small percentage to be imported, a difficult administrative problem was presented to the Board of Trade and to the department: what firms were to get import licences, and how much was to be allotted to each firm? There are hundreds of firms in New Zealand dealing with boys' outerwear. They comprise retailers, wholesalers and manufacturers. It is possible that a retailer would handle such a small proportion of the small quantity of imports permitted that an individual import licence issued to him would come to a very small amount. After extensive discussions with the clothing distributors, and the interested associations or federations, firms were graded on a 'points' system. Departmental stores of a certain type were given a certain number of points; wholesalers were also graded, and so on. The first qualification, of course, was that the firm had at the time to be dealing with goods of the class under discussion. Secondly, it was a condition that they should have made substantial imports in each of any two years during 1952 to 1956 of *any* items of apparel which could be freely imported, and which were classified under other sections of Tariff Item 136; that is, the firms had to be in the importing trade. Licences were granted to each firm for a c.i.f. value and for a specific number of garments. Licences were exhausted once the value of the licence or, alternatively, the number of garments specified, was reached.

These few descriptions show, I think, first, the care taken in ensuring a just allocation of the import licences available, second, the discussion with the industry concerned before a decision was made, and third, the attempt to handle licences in a way which would promote the policy objective—namely, providing variety and quality through the medium of a liberalised import control. They also show that the aim is to submit administrative discretion to a set of principles and rules, in such a way as to bring precision into administration and reduce to a minimum the area where final discretion is necessary. It is, of course, impossible to eliminate the area of discretion entirely, but, where there is discretion, the

procedure again is to bring to bear the experience and judgment of senior officers, so that justice shall be done, and shall be done in such a way that the precedent created may apply with equal justice to the future.

There are, of course, many variants of the illustration I have just quoted, and some of them are much more difficult administratively, but I think I have given sufficient examples of how administrative discretion is exercised so as to consider and weigh all aspects of the public interest. It may seem a fearsome task, but when a department has been handling similar problems for many years, a tradition grows up, which means that any senior officer can quickly discern when an application for an import licence cannot be granted because it is not covered by policy; it is easy to recognize an 'out of line' decision, and to regard it with something amounting to horror. It is also reasonably easy to judge when the public interest does *not* seem to be served by the policy laid down. Here remedial action follows, which, of course, is related to our system of parliamentary democracy where the slightest hardship suffered, or thought to be suffered, by a person dealing with officials can quickly be communicated to Government, even at the highest level.

It should not be assumed from my apparent insistence on the principle that underlies administrative discretion, namely the serving of the public interest, that administrators are silver-haired saints obsessed with doing good in the public interest whether the Public likes it or not. Neither are they a Machiavellian Society, determined to get its own way in the face of opposition, or even of reversals of its own administrative decisions. Mr J. R. Marshall maintains in his paper[1] that the inspiration for policy arises from many sources. Ministers have the advantage of receiving those inspirations, and balance them against the advice they receive from their officials. I would add that collectively Ministers are men of commonsense and experience in many fields. They do not by any means slavishly follow or combine with the official in the face of suggestions and advice from other quarters.

My line of argument is also relevant to two points raised in the discussion on Mr Cooke's paper.[2] Apprehension was expressed that, if an administrative decision were set aside, the administrator would eventually retaliate somehow, and so destroy any gain made by the party who caused the decision to be altered. I have not in

[1] See pp. 54-5, above.
[2] See p. 112, above.

my experience met such an attitude of mind in high officials. I hope that my underlying note of the need for the official to serve the public interest will help to dispose of any such fears or apprehensions.

A related point was made that administrators might be strong enough to secure legislation to alter a ruling made by the courts. Here again, it is necessary to recall the boundaries within which the courts must work. The development of the social and economic structure of a country is necessarily slow and gradual. The laws attending the social and economic structure must necessarily follow that slow development. History shows that they do not precede it. When therefore, in the face of a ruling by the courts that the way discretion was used lacked a foundation of law, administrative advice is eventually backed by legislative action, it is not to be assumed that the officials have arbitrarily persuaded the Ministers and that Ministers have arbitrarily backed them to reverse a ruling from the bench. The administrator has merely followed the principle of helping to develop the law in sympathy with the development of the social and economic structure.

DISCRETION: RULES AND RELATIONS WITH THE PUBLIC

I said earlier that it was necessary to devise a set of rules and principles to bring about administrative precision and to reduce to a minimum the area where final discretion must be used. That is another way of saying that, in order to cope with a mass of day-to-day work, it is essential not only to have a policy but also a set of rules and instructions for the staff who have to handle the daily volume of applications, enquiries and so on from the Public.

It is in the field where rules and instructions are applied that the accepted implications of the term, 'bureaucracy' may appear to have reasonable foundation, in the sense that the public servant may be unwilling or unable to depart from the rules and instructions given to him. There are two important principles to bear in mind in administering any department. One is that the daily operations performed in pursuance of a policy should be made as clear-cut and routine as it is possible to make them. Only by formulating definite rules is it possible to free the executives from a mass of detail; they are thus enabled to carry out their jobs of supervision and of assisting in the formulation of policy through the study of economic, social and other conditions. In commercial or factory language, the department's operations should

be put on an assembly-line basis as far as possible. But a result of such machine-like operations, which are an essential concomitant of efficient administration, is that the subordinate officer whose actions or decisions are in terms of the rules cannot possibly deal with the case which the rules do not cover. Because he cannot do so he is often classified as a bureaucrat. But that charge should be levelled rather at the higher official strata–the executives–whose responsibility it is to exercise administrative discretion, if, without due cause, they fail to do so.

The other principle to bear in mind is that the work of the high officials whose function it is to exercise administrative discretion, is not merely *executive*; it is *political* in the best sense of the word–i.e., assisting in the formation of policy.[3] Their work embraces obedience to the law as determined by Parliament, a very different situation from obedience to the flexible control which can emanate from boards of directors in private enterprise (where the term 'bureaucracy' in relation to the Public Service is so frequently heard). Their work is regulated by the dictates of Cabinet, which is responsible through the Government to Parliament and to the Public at large. The high officials are governed by loyalty to their Ministers, and give expression to it by prudence, moderation, impartiality, skill and discretion. So all these factors, and the list is not exhaustive, are an environment for the ethics which govern the exercise of discretion in those cases which the department's operational rules do not cover; the discretion cannot be simply exercised in the way the Public or an individual member would probably like, or in the way that the high official might like if he were to decide cases 'on their merits' –that is, the merits as he, personally, might see them. Before the epithet, 'bureaucrat' can be fairly levelled at the high official, it is necessary to know whether his failure to decide (in the way the leveller would like) the cases that the rules do not fit, stems from the existence of the many factors or conditions by which he is governed. And because so many of these factors are politically confidential, the reasons for his apparent failure to exercise the desired discretion are never likely to be known.

The two important principles mentioned above have a bearing on the exercise of delegated powers by officials. After Mr J. R. Marshall gave his paper he was asked whether such powers might not be abused.[4] My own emphasis on the prudence, moderation

[3] See pp. 43 ff., above.
[4] See pp. 64-5, above.

and loyalty, which officials must extend to their Ministers, will perhaps reinforce his reply that ministerial controls are adequate to prevent abuse.

A department such as Industries and Commerce is in a rather awkward situation in this respect. I think a lot of explanation, assistance to officials and some goodwill have been achieved through the use of advisory committees, comprising representatives of the department and of those federations, associations and industries which are concerned with the matters the department is required to deal with. Although the advisory committees are not executive or administrative in any way, an understanding of why certain things cannot be done, or must be done in a particular way, has been gained by organizations which, otherwise, could be expected to voice criticism of the department. Through the operation of such committees, the exercise of administrative discretion has become better understood, and the department has been assisted in preparing procedures for handling a new problem or in varying existing procedures to meet changing conditions.

In a department concerned with trade and economic affairs, it is a moot point whether public relations, in the conventional sense of press or radio releases are of primary value. With the contacts that are available between, say, the Department of Industries and Commerce and Chambers of Commerce, the Manufacturers' Federation, the primary producers' organizations, the main industrialists and the many *ad hoc* committees representing the department and the producers which are set up from time to time, it is not difficult to explain a course of action, win an understanding and even support of it, and, consequently, avoid adverse public criticism. If reason and commonsense underlie the course of action, and consent to it is won even on a 'trial and error' basis, good public relations would seem to have been achieved with the parties who matter. I believe that the methods employed in the administration of some import controls which I described earlier, resulted in satisfactory public relations. Support for that belief is forthcoming from the fact that none of the interested parties have adversely criticized the methods, or produced other suggested methods to supplant them.

It would be very satisfactory if the Public had better understanding of the problems that attend the expansion of this country, and the building up of export income in relation to that expansion

and to the policy of full employment. It is to be expected that what, to the official eye, looks best for the public interest in the matter of long-term economic development, may appear unprofitable or distasteful to the commercial eye. Some reconciliation of competing views could possibly be better achieved through the medium of the Press than through the cold annual departmental report. I am aware that it is an objective of the Minister of Industries and Commerce to have material prepared on economic subjects for consideration by, and issue through, the daily Press. It is an objective that deserves praise and every active support.

While a good deal has been said, and something has been done, about public relations for the purpose of acquainting the Public of the necessity for various Government actions, danger lies in the use of public relations men on trade and economic affairs, unless they are well acquainted with the subject itself and with the chain reactions that too early or ill-timed publicity can bring about. So many complex economic issues and relationships of a political, and even strategic, nature surround the apparently straightforward subject of trade development, that the undertaking of public relations without first seeking the advice of the responsible administrators can be fraught with danger. Administrators would counsel refraining from publicity until a road of negotiation and the shape of things at the end of that road are fairly clearly seen. It is one thing to embark, through public relations activities, on a campaign of enlightenment about the necessity to sell primary products, whether butter, meat or timber, to a certain country. It is quite another thing to find, after the campaign has been undertaken, that the existence of the Ottawa Agreement and the General Agreement on Tariffs and Trade, or political associations or estrangements, hinder or prevent the attainment of the publicized objective. Administrative discretion, backed by experience can avoid such a situation. There has been, to my knowledge, a tendency at top level to instruct the public relations men first, and to consult the administrators afterwards. The result has sometimes been that the interest of public bodies and the Press has been so aroused for the production of results of some kind as to bring about a chain of events which were not easy to defend under the criticism of other Governments and of industrial interests both here and abroad. The consequences might have been different if the administrators had been consulted beforehand.

Public relations are most desirable for the enlightenment of all

interested or affected by a course of public action, but let the course be carefully set and the end clearly seen and justified before the publicity is undertaken.

It seems to me that there are at least two things requiring development in that part of the official world which deals with trade and economic matters. One is adequate investigation into the basic conditions affecting New Zealand's economy (the lack of this goes also beyond the Public Service), and the other is the publishing of the available information in a form that will aid the governed to understand the problems surrounding those who govern and perhaps help the latter with their task. By 'publishing' I mean spreading information, not in the form of boring hand-outs, but by way of intelligent discussion and appraisal of some current problem.

Even if the Public were merely apprised through the Press about the neglect of economic research in this country, and were alerted to the dangers of lack of investigation into our fundamental problems, something would have been done as a start. And if public interest were aroused, at least to the point of recognition of those problems and the dangers which attend failure to face them, something more would have been achieved. Professor Evans of the University of Wales, who visited this country last year, said: 'Many important decisions seem to be taken (in New Zealand) without the careful economic calculation which one would expect in a young developing country with so many calls on available resources. . . . Some good work is being done but the effort seems puny in comparison to the magnitude of the job.' Greater public appreciation of the factors affecting our vulnerable economy, may be a first step to repairing the neglect of economic research which Professor Evans found so remarkable in this country, now, as he rightly thought, at a critical stage of its development.

ADMINISTRATIVE DISCRETION AND ADVISING MINISTERS

I shall now develop a little more a matter I touched on earlier, the exercise of administrative discretion in regard to a party platform, and the ethics of giving advice to Ministers.

A public servant is, or should be, in my view, unconcerned with political parties but concerned with continuity of policy in the public interest. Lest that remark be misinterpreted to mean that public servants get their own way in the end, I add that once a policy decision is made by the Government or a Minister,

after all evidence and advice have been studied, the public servant is bound to, and does, carry out the decision, even though it may be contrary to his advice. But he is equally bound to tender his advice and experience, no matter how definite a commitment may have been contained in a party platform; he cannot say 'Well, there's the announced intention of the new Government. I must carry it out.' Certainly he will carry out the policy of the Government, but history shows that policy is not extracted from, and implemented on, a party platform. It is set by Cabinet and, as necessary, by statute or regulations, and custom shows that those steps occur after full consideration of administrative experience and advice.

A party platform at the 1949 election contained the abolition of price control. It would not have accorded with the best administrative ethics to have refrained from tendering reasons to the new Government of 1950, elected on that platform, why time and circumstance had not then arrived to warrant the removal of the control. If one cares to examine a Price Tribunal Decision of June, 1954,[5] there will be found, in substance, the reasons which the discretion of the administrator in 1950 saw fit to put before Government, and which the Government saw fit to accept, for the continuation of the control until other conditions, such as increasing competition and removal of other controls, warranted the reduction of price control. That simple example is typical, I think, of the administrator's responsibility in relation to party platforms and of the good sense of the persons whom our democratic machine moves from party platform to party government.

My experience of advice to Ministers has been confined of recent years to fiscal, trade and economic matters. The nature of it can be gathered to a degree from some of the material in this paper. In essence, the exercise of administrative discretion in advising Ministers consists of a true and complete record of facts, together with as accurate a forecast of events as knowledge, experience and judgment enable the official to submit, along with his unbiased and fearless recommendation. All that is a truism. But what would the official do if he *were* the Minister with all the pressures that bear upon him from other quarters? Would the official then follow 'his own' advice, based upon cold appraisal of facts, statistics and economic principles, and ignore parliamentary opposition, hostility of powerful outside interests,

[5] No. 3592 of 21st June, 1954.

the Press and even the Public at large? The answers to those questions are, of course, obtained by 'personal invitation only' from the Minister, and are not usually volunteered by the official! By no means is a ministerial invitation usual. I cannot, of course, say what professional ethics require should be done in such a situation. I do not know whether such situations arise generally, and what discretion has been exercised in meeting them. I can only say that I have encountered them in my own experience, and I have done my best to stand mentally in the shoes of the Minister. It should be the concern of the administrator to see that his Minister is not placed in an impossible situation as a result of his refusal to tender advice to him beyond what cold figures and facts indicate; the administrator must have a political sense, in the best meaning of the term. My own attitude is best expressed in my personal philosophy that a top public servant is primarily concerned not with parties but with continuity of Government. If due cognizance of short-term pressures and problems aids the Government of the day in achieving long-term aims, then I would not hesitate to advise deferment or alteration of the measures which purely official considerations may counsel.

CONCLUSION

In my remarks about the exercise of discretion in the sense of day-to-day administration (import licensing administration, for example), I have tended to dwell upon the exercise of discretion in respect of administering an established policy and practice or in respect of the variation of existing policy and practice. I have not overlooked, though, the problem of applying administrative discretion to an entirely new situation or to conditions when experience has not been sufficient to establish anything more than the most tentative outline of policy. From many personal experiences of those situations, ranging from the introduction of social security, through the new department of that name in 1939, to the devising of the Lend-Lease system in New Zealand in the last war, I can readily agree that the exercise of administrative discretion in established conditions is a very much easier task than trying to administer discreetly a *new* policy, that exists, perforce, in the broadest terms. In the latter situation an administrator may find himself assisted to a varying degree by the reputation for fairness he may have built up under more settled conditions.

It is in the early stages of handling a new problem that the charge of bureaucracy is most frequently heard. It is precisely in those stages that it is most difficult to explain administrative decisions to the Public or prepare them for their effects. Pressure of time and lack of knowledge, experience and clear-cut policy as the administrator feels his way, all militate against his ability to secure public understanding and co-operation. Nevertheless, if administrative discretion is based upon the principles of reason, fairness and tolerance, the official can take comfort in the knowledge that, in accord with the best standards for a public servant, he has served his Public as well as the policy set by his masters and his own aptitude have permitted.

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THE DISCUSSION

Professor K. J. Scott asked the speaker to comment on the Constitutional Society's proposal that the courts should be empowered to review administrative decisions. Mr Marshall, in his reply, referred to the special difficulties that an administrative Court of Appeal, if created, would have in securing information; it could obtain adequate data and advice only from those same departments which had made the original administrative decisions.

Dr A. Douglas believed that public servants might on occasion have difficulty in reconciling their professional ethics, for instance the medical code, with the public service code of ethics. He thought that, for promotion purposes, short-term efficiency was sometimes rated too highly compared with integrity in the sense of following an ethical code. Mr Marshall commented that it was hard to assess integrity until comparatively late in a public servant's career, but that integrity *was* considered when the highest appointments were made.

Mr J. V. T. Baker suggested that part of the difficulty of setting acceptable standards arose from the Public's being slow to realize the rapidity of social and economic change.

Mr S. Greenberg wanted to know how the public servant could distinguish between sectional interests and the public interest. Mr Marshall believed that public servants were sufficiently well informed to make such a distinction; in his opinion 'wearing out the carpet' was not effective, because administrators were skilled in dealing with such tactics.

Bibliographical Note

Many of the most useful sources on bureaucracy in New Zealand have been mentioned in the footnotes. Some of them have wider application than the specific reference may suggest.

Leslie Lipson, *The Politics of Equality* (University of Chicago Press, 1948) is valuable for the period up to 1947. There is a briefer section on the Public Service in Leicester Webb, *Government in New Zealand* (Department of Internal Affairs, Wellington, 1940). Legal aspects are covered in J. L. Robson (Ed.), *New Zealand, The Development of its Laws and Constitution* (Stevens, 1954).

Reference may also be made to the *New Zealand Official Year-Book*. The *Appendices to the Journals of the House of Representatives* are another source of information. Among them the Report of the (Hunt) Commission on the Public Service, 1912 (*Appendices to the Journals of the House of Representatives,* 1912, Session II, H-34) and the Annual Reports of the Public Service Commission (from 1913) are particularly useful. Departmental reports are also printed in the *Appendices to Journals.*

There are also several relevant articles in the *New Zealand Journal of Public Administration* (1938–). An index to the articles in this Journal was published by the New Zealand Institute of Public Administration in 1956.

A comprehensive book, *Government Administration in New Zealand,* by R. J. Polaschek, is now ready for publication and is expected to be available in 1958.

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PRINTED BY WHITCOMBE AND TOMBS LIMITED—21071

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